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INQUIRY  
INTO THE  
RISE AND GROWTH  
OF  
THE ROYAL PREROGATIVE  
IN  
ENGLAND.

A NEW EDITION,

WITH THE AUTHOR'S LATEST CORRECTIONS, BIOGRAPHICAL NOTICES, &c.

TO WHICH IS ADDED

AN INQUIRY INTO THE LIFE AND CHARACTER OF KING EADWIG.



By JOHN ALLEN, Esq.,

LATE MASTER OF LUTWICH COLLEGE.

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## EDITOR'S PREFACE.

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THIS edition is printed from a corrected copy of the work lent to me several years ago by the author, who long before his lamented death in 1843 had contemplated a new edition of the 'Inquiry,' with some alterations and additional matter. That his intention was not carried into effect is to be deeply regretted.

The 'Inquiry into the Life and Character of King Eadwig' I selected from among a large number of the author's manuscripts, which were kindly placed in my hands by the late Lady Holland, with permission to transcribe from them whatever I might deem desirable either for my own use or for publication. This tract, though powerfully written and bearing the impress of the author's mind on almost every page, yet seems to have been regarded by him as an unfinished publication. In his 'Reply to Dr. Lingard's Vindication,' he evidently alludes to it, when, speaking of "the tragic tale of Edwy and Elgiva," he says, "The materials I had collected I put together; but as the subject was of

little interest, and of still less intrinsic importance, I threw my essay aside, and most probably should never have looked at it again, if I had not been a second time seduced into a review of one of Dr. Lingard's publications."

The references to the Anglo-Saxon Laws are made to the 'Ancient Laws and Institutes of England,' folio, printed under the late Record Commission, in place of the 'Leges Anglo-Saxonicae' of Wilkins, as in the former edition. For most of the Anglo-Saxon charters mentioned in the work, reference is given to their places in Kemble's 'Codex Diplomaticus Ævi Saxonici.'

Prefixed are two biographical notices of their early and valued friend, the author, communicated, as a tribute to his memory, by Sir James Gibson Craig, Bart. and Major-General Fox; also the notice of his work from the Edinburgh Review, and the 'Rapport' on the same of M. Béranger, read before the National Institute of France, showing, if necessary, the high estimation in which the work is held, both at home and abroad.

B. THORPE.

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# BIOGRAPHICAL NOTICES

OF

THE AUTHOR



*Sir James Gibson Craig, Bart., to Major-General Fox.*

JOHN ALLEN was born at Redfoord, in the parish of Colinton, near Edinburgh, on the 3rd of February 1771.

His father, James Allen, was a writer in Edinburgh, and proprietor of the small estate of Redfoord, now part of the property of Mr. Trotter of Dreghorn.

His mother was Beatrix Wight, daughter of Mr. Robert Wight, a most respectable farmer in the same parish.

Mr. Wight was, before the marriage, tenant of the farm of Kingsknowes, the property of James Carmichael of Hailes, Esq., in which the great freestone quarry of Hailes is situated. Mr. Carmichael offered him a feu (a perpetual lease of the quarry) at a rent of £100 Scots (£8. 6s. 8d. sterling), but at that time there was only a country sale for the stone—there was no demand for it



from Edinburgh, which was then a very insignificant place, in comparison of what it now is. The new town of Edinburgh was not then begun to be built, and Mr. Wight, thinking it an unsafe speculation, declined it. The successors of Mr. Carmichael have within the last fifty years drawn nearly £150,000 of rent from the quarry, and are now getting a large annual return from it.

Mr. Allen's father died in bankrupt circumstances when he was young, but he was enabled to complete his education by the kindness of his mother's family and of Mr. Robert Cleghorn, a most respectable farmer, whom she took for her second husband.

Mr. Allen was apprenticed to Mr. Arnot, a surgeon in Edinburgh, with whom John (afterwards Professor) Thomson was also an apprentice; they became most attached friends, and continued to be so till Mr. Allen's death.

Professor Thomson was originally intended to be a weaver, and laid the foundation of his future eminence by laborious study while following that occupation. He had the books he was studying always lying open at the side of his loom, and never lost a moment he could spare in making use of them.

Mr. Allen and I were both enthusiastic admirers of Mr. Fox, and of the *first* proceedings of the French revolution, which appeared to us to promise the greatest blessings to mankind; and not-



withstanding the horrors and miseries through which France has since passed, a candid person must admit that our anticipations have been in a great degree realised.

On the taking of the Bastille, an idea was started, that it should be celebrated by a dinner in Edinburgh. Mr. Allen and I took a leading part in the necessary preparations, and thus our acquaintance, and a friendship which lasted during his life, was then formed.

Every effort was made by threats, promises and influence of all kinds to prevent the dinner taking place, and afterwards to lessen the effect of it. Those concerned in it were held out to be little better than traitors; and James Laing, who then took the charge of the police of Edinburgh, stationed himself at the door of Fortune's Tavern, where the dinner was to take place, noting down the names of all who entered the house.

The party consisted of twenty-four, which was more than we expected, considering the means used against us. Our Chairman was Alexander Fergusson of Craigdarroch, father of the gentleman who signalized himself with Lord Thanet at the trial of O'Quigley at Maidstone.

I regret to say that our Chairman became a renegade to the principles he most strongly professed. He was killed by the carriage, in which he was, being overturned at Eriestane Brae on the Dumfries road.

Of those who were present, I only remember,—  
John Clerk, afterwards Lord Eldin.

David Cathcart, afterwards Lord Alloway.

Adam Gillies, afterwards Lord Gillies.

Malcolm Laing the Historian.

John Miller, advocate, son of Professor Miller  
of Glasgow.

Thomas Wilson, advocate.

Archibald Fletcher, advocate.

Charles Ross, Esq., advocate.

James Campbell, afterwards solicitor in London.

John Allen.

John Thomson.

Amos Morrison, writer in Edinburgh.

James Gibson, now Sir James Gibson Craig of  
Riccarton, Bart., believed to be the only sur-  
vivor.

These formed the nucleus on which the liberal  
party of Scotland was founded. None of them ever  
swerved from their principles. They ever main-  
tained them in the most determined manner, and  
several of them lived to see them triumphant by  
the passing of the Reform Act.

Mr. Allen became a member of the College of  
Surgeons and of several societies, in which he  
greatly distinguished himself.

Some time after the taking of the Bastille had been  
celebrated, Thomas Muir was indicted to stand trial  
before the Court of Justiciary for sedition. He had  
never been of our party ; but Allen and some of

our friends hearing that he meant to defend himself, strongly remonstrated against his doing so, being convinced that a man "who is his own counsel has a fool for his client," and he was offered gratuitously the best assistance. The Honourable Henry Erskine agreed to be his counsel; but he was a perverse, conceited person, and would take no advice.

He was found guilty and sentenced to transportation. All were thunderstruck with the extreme severity of the sentence, and none more than the jury. They met immediately after the Court rose, and unanimously expressed their opinion that the sentence was beyond all measure severe. They thought Muir's guilt had been so trivial, that a few weeks' imprisonment would be a sufficient punishment, and they resolved to prepare a petition to the Court, and to meet next day for the purpose of signing it. But when they met, Mr. Innes of Stow produced a letter he had received, threatening to assassinate him for his concurring in the verdict of guilty, on which the jury separated, considering it impossible for them to interfere.

Of this I was informed by my uncle, Mr. Balfour of Pilrig, who had been clerk to the jury.

It is impossible to give an idea of the hostile feelings which actuated both parties at this time: society was in a great degree broken up. In ordinary dinner parties it was considered not safe to ask persons to meet who were opposed to each other

in politics, and the most extraordinary measures were resorted to.

The late Lord Daer gave a dinner in Hunter's Tavern, Writers' Court, Edinburgh, to about twenty of the leading Liberals, of whom Allen, Thomson, and I were part.

In the tavern there were two rooms, parallel, separated by a thin wooden partition: what passed in the one room could be distinctly heard in the other. Our party met in the one room, leaving our hats in it, and when dinner was served went into the other. After dinner, one of the party, having an engagement of business, left the dinner-table, went into the next room to get his hat, and almost instantly returned, saying, "Be on your guard in what you say—the sheriff of the county and a celebrated professor of law (naming them) are in the next room, without wine before them, listening to what is going on."

At this dinner a very amusing blunder was made by Mr. S. of Culcreuch, which occasioned great merriment. In the enthusiasm of giving a toast, he exclaimed, "May we all die like Hampden on the field, or Sydney on the scaffold."

Allen became acquainted with the late Lord Lauderdale, who soon entertained a very high opinion of him. He recommended him to Lord Holland, with whom he lived from 1802 till his lordship's death, and afterwards with Lady Holland till his own death.



I saw him often in London, and had by his means the honour of often dining with Lord Holland, who conferred great obligations upon me, and showed me never-failing kindness, and afterwards with Lady Holland.

At one of these dinners, while the Reform Bill was in progress, the late Lord Melbourne was present, and a great deal of conversation took place as to the political state of Scotland, when I gave the history of an election for the county of Bute, which greatly amused the party.

The writ for election was transmitted to the sheriff, Mr. McLeod Bannatine, afterwards Lord Bannatine. He named the day and issued his precept for the election. When the day of election arrived Mr. Bannatine was the only freeholder present. As freeholder he voted himself chairman of the meeting. As sheriff he produced the writ and receipt for election; read the writ and the oaths against bribery at elections. As sheriff he administered the oaths of supremacy, &c. to himself as chairman. He signed the oaths as chairman and as sheriff. As chairman he named the clerk to the meeting, and called over the roll of freeholders. He proposed the candidate, and declared him elected. He dictated and signed the minutes of election. As sheriff he made an indenture of election between himself as sheriff and himself as chairman, and transmitted it to the Crown Office.

This was certainly a very extreme case, and no-

thing could be a more perfect farce. But at that time Scots elections were little better. On one occasion Henry Dundas named the sixteen Scots peers and forty-three of the Scots commoners, the only exception having been the late Lord Archibald Hamilton and the present Lord Panmure.

Mr. Allen was a most sincere, zealous and active friend, possessed of great and highly cultivated talents ; highly respected by Lord Holland and all the leaders of the liberal party ; of a very firm, decided and most independent character. His opinions and writings in literature and in politics were very highly appreciated and eagerly sought for. He was a very remarkable man ; and although he never sought for or attained a high station, he may be said to have been a great man.

He was Warden, and afterwards Master, of Dulwich College<sup>1</sup>, &c. &c.

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*Major-General Fox to the Editor.*

Addison Road, August 6, 1849.

MY DEAR SIR,

You asked me for some memoranda or anecdotes regarding my late old friend John Allen. I only

<sup>1</sup> He was elected Warden in 1811, and succeeded to the Mastership in 1820.



wish that I had the power and the time to give you a sketch of his life and character, but I fear that I am not able to do him justice.

You, I believe, knew him quite well enough to be able to give your readers a faithful idea of his great and varied attainments, as well as to describe the honest though peculiar points of his character. I will only briefly give you some of my recollections of him, and also send you with this an account of his earlier life, kindly drawn up, at my request, for your use by his intimate and now venerable friend Sir James Gibson Craig, Bart.

I first remember, and never shall forget, John Allen when he came to Holland House in 1802, recommended to my father by the late Lord Lauderdale, as a medical friend and companion for the continental tour which we then made during three years in France and Spain. He was a stout, strong man, with a very large head, a broad face, enormous round silver spectacles before a pair of peculiarly bright and intelligent eyes, and with the thickest legs I ever remember. His accent Scotch; his manner eager but extremely good-natured; all this made a lasting impression on me, then a boy of six years old.

Our journey through France to Valencia was long and slowly performed; the late John Kemble and Frederick Ponsonby<sup>1</sup>, at that time a young

<sup>1</sup> Second son of Lord Bessborough, and afterwards a very distinguished cavalry officer, left for dead on the field of Water-

cornet of the 10th, were of our party. Allen used to be constantly reading, and also kept a very exact and minute journal of all he observed and heard, which was his practice whenever travelling. Whilst the post-horses were changing, he used to walk on at a rapid pace with his book, and frequently arrived at the next relay before the *cortège* of three large English carriages could overtake him, which to prevent he sometimes ran, an operation which was a great amusement to me, as though active and buoyant, his gait was most extraordinary, and he used to move from side to side in running in a manner not a little laughable.

In Spain he studied with great assiduity, and made himself master of the early constitutions of the different provinces of that interesting country, and I believe knew them better than any foreigner of his time; his articles in the 'Edinburgh Review' will fully bear this out. He had ample opportunities of assisting his studies by conversation with eminent and learned Spaniards during the year we spent at Madrid. He there became intimate with Don Antonio Capmany, Don Manuel Quintana<sup>1</sup>, and many other literary men.

loo. He was Governor of Malta in 1831 and 1832, and died much regretted and beloved shortly afterwards from the effects of his old wound.

<sup>1</sup> Don Antonio Capmany, a native of Catalonia, and author of several works of great research, and subsequently a most zealous partisan against the French, and editor of the '*Centinella contra los Franceses*,' which appeared at Cadiz. Quintana, the most cele-

The capture and destruction of the four Spanish frigates by an equal squadron of ours in 1804, previous to the declaration of war, obliged us to hasten out of the country, and afforded the then all-powerful Prince of the Peace (Godoy) an opportunity of acting in that gentlemanlike and graceful manner for which his countrymen are so frequently and justly esteemed. We were at Valladolid when the news of this unlucky event arrived, attended with circumstances not a little likely to irritate the national pride of the Spanish public, which with the recent example of the emperor Napoleon's conduct in detaining the English travellers, rendered my father anxious as to the course that the Spanish government, with a far greater appearance of justice, might be induced to pursue. Quite the contrary; on his application to the Prince of the Peace, he wrote back, that not only might Lord Holland and his family leave Spain by such route and at such time as they pleased, but that they were at liberty to return to Madrid and remain there as long as suited them, which we did.

We returned to England from Lisbon in 1805. Allen was always occupied with writing, and soon after the expulsion of the Whigs from office, produced the historical portion of the 'Annual Registered of modern Spanish poets, also a very beautiful writer of prose, as known by his 'Lives of Illustrious Spaniards,' which has been translated into English. He is still living; I had the pleasure of seeing him at Madrid in 1840, respected and esteemed by all parties.



ter' of 1806-7, as also several articles in the 'Edinburgh Review,' and a short memoir of Mr. Fox.

He lived on at Holland House, when about 1810 he became Warden of Dulwich College, where he occasionally went to stay, and where his zeal for the good of the college, and his judicious management of it, when he subsequently became its master, and his attention to the schools and charities depending on it, will be long remembered with affection and gratitude.

In 1808, on the breaking out of the War of Independence, my father and family again went to Spain, Allen and Lord John Russell being of the party.

Allen's journal at this time is highly interesting : he took great pains to describe the operations that were taking place in that country, and also assisted in the discussions as to the method by which the Cortes were to be assembled, which however did not take place till after our departure. During our residence at Seville in 1809, Jovellanos was almost daily at my father's house ; he was then a member of the Central Junta, and was as remarkable for his learning and knowledge of the laws and constitution of his country as he was for the uprightness of his character and the easy dignity of his manners. The events of 1814 again enabled my father to go abroad, and Allen was with us in France, Italy and Germany.

Allen's opinions were essentially republican ; he

had early imbibed them, and was an ardent admirer of the early proceedings in France during the first Revolution ; and although his kind disposition revolted at the horrors and cruelties that ensued, he for a long time had hopes of a return to an honest and philanthropic republican government, and was always indignant at the idea of a reaction, and at the pretence set up by some for arbitrary measures, on the plea that republicans must be such as Marat or Robespierre. It was not till Napoleon assumed the purple that these hopes were blasted ; and great was then his despair and indignation. The restoration of the Bourbons in 1814, the firm tenure of government by the ultra-Tories of that day in England, the desertion of liberal views by the Prince when he became Regent, were to Allen as a close of all his political hopes of seeing the country governed on principles he admired, so much so, that he seldom devoted his time to modern politics ; and from about this period gave his attention chiefly to the early history of our constitution and to the study of Anglo-Saxon.

Though so eager a republican in theory, he was not one of those who would have overturned our constitution, for which he had a sincere admiration ; so also was he the most liberal of men towards others of all opinions, provided he deemed them honest in their profession of them. Violent often in language, and uttering the most terrific expressions towards those he believed to be either hypocrites,

or cruel, or bigoted, he was in acts and deeds most gentle and kind-hearted. A stranger hearing him discuss the Slave Trade and the punishments he would award to those found carrying it on, or to any one telling a falsehood, or for ill treatment of children especially, would have set him down as one of the most vindictive dispositions possible.

I have nearly all Allen's manuscripts, and amongst them, as you know, a vast mass of notes and memoranda on Anglo-Saxon history and literature. The rest are chiefly notes on Spanish subjects, and journals during his different journeys, and occasional diaries kept during remarkable periods of public affairs in England. These are more remarkable for the precision and exactness with which he narrates what he saw and heard, than for general remarks or views of society and manners. All are written in the plainest and most simple style. He was a man of little imagination, but of the most capacious understanding, and with a memory rarely equalled as to facts or observation of what he had read and heard. He was not so remarkable for learning by heart, as for being able to give the whole details of any book that made an impression upon him.

I have thus hastily written down what occurs to me as likely to be interesting to you of my dear old friend ; much more I might and would write, but at all events I am happy to be able to give my humble testimony to the good and honest qualities



of John Allen, who, through nearly all my life till his lamented death, was ever kind, friendly and useful to me, and who was a man, as I have before said, gifted with very remarkable powers of mind and tenacity of attention and memory.

Very truly yours,

C. R. Fox.

---

Of Mr. Allen, Lord Brougham, who knew him well, thus speaks :—

“ It would be a very imperfect account of Lord Holland which should make no mention of the friend who for the latter and more important part of his life shared all his thoughts and was never a day apart from him, Mr. John Allen ; or the loss which in him the world of politics and of science, but still more, our private circle, has lately had to deplore, another blank which assuredly cannot be filled up. . . . . If it be asked what was the peculiar merit, the characteristic excellence of Mr. Allen’s understanding, the answer is not difficult to make. It was the rare faculty of combining general views with details of facts, and thus at once availing himself of all that theory or speculation presents for our guide, with all that practical experience affords to correct those results of general

reasoning. This great excellence was displayed by him in everything to which he directed his mind, whether it were the political questions of the day, which he treated as practically as the veriest drudge in any of the public offices, and yet with all the enlargement of view which marked the statesman and the philosopher ; or the speculations of history, which he studied at once with the acumen that extracts from it as an essence the general progress of our species, after the manner of Voltaire and Millar ; and with the minute observation of facts and weighing of evidence which we trace through the luminous and picturesque pages of Robertson and Gibbon. He for whom no theory was too abstract, no speculation too general, could so far stoop to the details of practical statesmanship as to give a friend, proceeding for the first time on a delicate and important mission, this sound advice :—‘Don’t ever appear anxious about any point, either in arguing to convince those you are treating with, or in trying to obtain a concession from them. It often may happen that your indifference will gain a much readier access to their minds. Earnestness and anxiety are necessary for one addressing a public assembly—not so for a negotiator.’

“The character of Mr. Allen was of the highest order. His integrity was sterling, his honour pure and untarnished. No one had a more lofty disdain of those mean tricks to which, whether on trifles or matters of importance, worldly men have too fre-

quent recourse. Without the shadow of fanaticism in any of its forms, he was, in all essential particulars, a person of the purest morals ; and his indignation was never more easily roused than by the aspect of daring profligacy or grovelling baseness. His feelings, too, were warm ; his nature kind and affectionate. No man was a more steady or sincere friend ; and his enmity, though fierce, was placable.”  
—From *Historical Sketches of Statesmen in the Time of George III.*, Knight’s edit. vi. pp. 175 *seqq.*

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Lord Byron in one of his letters has the following passage :—

“Allen (Lord Holland’s Allen—the best informed, and one of the ablest men I know—a perfect Magliabecchi—a devourer, a helluo of books, and an observer of men) has lent me a quantity of Burns’s unpublished, and never-to-be published, letters.”

---

The preceding notices embrace that portion of the life of my late friend, in which, perhaps, is comprised almost every particular relating to him of interest either to those who shared the happiness of knowing him, or to the general reader.

During the ten years that I enjoyed the benefit of



his acquaintance—for which I am indebted to the kind introduction of a mutual friend<sup>1</sup>—he was passing a life of tranquillity, apparently void of incident, with his old and affectionate friends, the late Lord and Lady Holland. Throughout the whole period of our intercourse I experienced repeated proofs of the kindness of his heart and of the depth and extent of his knowledge. It was to him I had recourse in every case of doubt or difficulty, while engaged by the late Record Board<sup>2</sup> in editing the ‘Ancient Laws and Institutes of England;’ for, without being a professed philologist, Mr. Allen’s familiar acquaintance with the laws, institutes and history of the Germanic nations of the Continent, supplied him with the power of thoroughly comprehending and penetrating the language and the drift of the legal monuments bequeathed to us by their kin, our own Anglo-Saxon forefathers. Of this knowledge, his work on the Royal Prerogative is a lasting memorial.

After the death of Lord Holland, an event which caused him the profoundest affliction, his literary pursuits seem to have been partially suspended; not because his energies were impaired, but because they were almost exclusively devoted to the cares which then devolved on him. In a letter I received from him at this time, he writes, “I have lost a much-loved friend of many years’ standing, and

<sup>1</sup> Sir Francis Palgrave.

<sup>2</sup> Of which Mr. Allen was a most useful member.

have nothing to look forward to but to render such services as lie in my power to those who have still more reason than I have to deplore his loss."

Of Mr. Allen's own last illness and decease, his friend Sir Stephen Hammick has obligingly supplied the following particulars:—

"Mr. Allen had been ill for a few days with a severe cold, attended with a soreness of the throat and a slight cough, to which he was occasionally subjected. It was not attended with fever, and did not prevent him from carriage exercise. Jaundice then appeared, and the disease soon assumed very alarming symptoms, which never were ameliorated. His strength rapidly gave way, and he died on the 10th of April 1843, being seven days from the first appearance of the jaundice. Mr. Allen was attended by Drs. Chambers and Holland, and Sir Stephen Hammick."

Besides the two works contained in this volume, Mr. Allen was the author of the following:—Two notices of Dr. Lingard's *History of England*, printed in the *Edinburgh Review*. A 'Reply to Dr. Lingard's *Vindication*, in a Letter to Francis Jeffray, Esq.' 1827. 'A Short History of the House of Commons, with reference to Reform.' 1831. 'Inquiry into the Tripartite Division of Tithes in England, by a Layman.' 1833. 'On Church Property.' 1834. 'Vindication of the Ancient Independence of Scotland.' 1833. A body



of Notes on the Laws of Henry the First, in the 'Ancient Laws and Institutes' before mentioned; together with many other articles, chiefly on historical subjects, in the Edinburgh Review, also of some medical papers. Mr. Allen was also a contributor to the Annual Register.

B. T.



*From the Edinburgh Review,*

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THIS is beyond all comparison the most important book upon constitutional antiquities and law that has appeared for many years. Indeed, it claims a very distinguished place among the great works upon those subjects which are familiar to the lawyer and the historian. Replete with profound and accurate learning, displaying everywhere extraordinary powers of reasoning and judging, clothed in a style at once simple and powerful, it possesses an additional title to the regards of those who love liberty, and value the institutions which are at once its best gifts and its surest safeguards ; it breathes throughout a warm love of freedom, and a firm spirit of resistance to the slavish maxims, which lawyers unhappily, as well as courtiers, have almost always been prone to inculcate. This spirit, however, has only guided Mr. Allen to investigate and expose the errors of his predecessors ; it has never warped his own judgment, or led him either to violent language or extravagant opinions. He exhibits the most calm determination always to search after the truth, and having found it, to make it known, but only as matter of legal and constitutional learning,

never as food for gratifying the factious and the clamorous. Indeed, the importance which our author attaches to the authority of former ages, and which is avowed by the very undertaking of the enquiry, squares but little with the rash and sweeping nature of the modern zealots for liberty and popular rights. That school, generally speaking, not only disregards all appeals to the wisdom of past ages, and despises all enquiry into the ancient system of our civil polity, but actually holds an institution to be the more surely ill-founded if its origin can be traced to less refined times than our own. Conceiving that society is improving, the disciples of the new academy look with more than suspicion upon every produce of the wisdom of earlier days. If any proposed practice can be truly said to be without the warrant of precedent, so much the more likely do they hold it to be an improvement; and consequently, if any principle can be found to have been adopted and acted upon by ruder ages, by so much are its claims to their assent held to be lessened. One of the chief apostles of the creed held by the wholesale reformers, the late Major Cartwright, deviated somewhat from their prejudices against antiquity; for the days of Runnimeade and Magna Charta were the great burdens of his song; and his predilection for annual parliaments was recommended to him not only by the practice of our ancestors, as far back as the sixth and seventh centuries, but also by the au-

thority of publicists in the seventeenth ; among whom he cited “ Mr. Prynne’s well-known work “ recommending the revival of short parliaments,” lucklessly mistaking the title of that book, so well known to him, that he could not possibly ever have seen it,—‘ *Brevia Parliamentaria Rediviva* ’ (*Parliamentary Writs Revived*). Since this very inauspicious attempt to graft radical reform upon ancient authority, we are not aware of any similar appeals to antiquity having been made, or any display of learning tried by the wholesale reformers. The school of Mr. Bentham, not certainly chargeable themselves with any defect of learning, have uniformly held such things cheap in others ; and with them Mr. Allen is likely to pass either for a friend of popular rights, whose zeal leads him to take a trouble wholly superfluous, when he traces them to the remotest periods of history ; or as an ally, whose aid rather impedes than furthers the progress of a cause resting wholly on reason, and ostentatiously disclaiming every thing like deference to authority.

From such objectors we take leave to dissent entirely. They commit here, as elsewhere, their accustomed error, of forgetting that they have to work with men, through men, upon men—that they have not to do with an ideal being, made by themselves, and fashioned to suit their theories—a creature actuated by no passions and no feelings but such as their theories allow, and filled with only



their own dogmas and their own views—that the men for whom they are giving laws, or forming systems of polity, are made to their hands, and will not, nay, cannot change at all, the first nature impressed on them at their birth—nor merely, except within certain narrow limits, and after a long time, the second nature with which habit has clothed them. They commit precisely the error which would condemn to lasting ridicule and ever-during lack of employment, a mechanist who should construct his engine without the least regard to either friction, or resistance, or the strength of materials ; he would produce something fair to behold, and resembling machinery, until it came to work, when it would either do nothing at all, or crush the workmen with its fragments. All the fundamental principles of dynamics, however, would be found to have been most learnedly complied with ; the artist would have chapter and verse to show for his elaborate calculations ; he would probably be as angry at the bystanders for doubting the accuracy of his work, as at himself when it failed, for having left out the consideration of the air, and the beams, and the ropes ; but in this respect he would differ widely from the intolerant and dogmatical Utilitarians—he would acknowledge the oversight ; whereas they only wax the more angry at all who doubt their infallibility, and call for more practical doctrines, and schemes more suited to the actual condition of human affairs.



That it may not be imagined we are indulging in general description, or invective, which they like not, or what they hate worst of all, sneers—they who are the greatest dealers in invective, the most unremitting callers of ill-names, the largest users of what they plainly intend for sarcasm—we shall illustrate what we say by one or two examples, familiar, we should think, to the initiated, and sufficiently suited to our purpose. The *characteristic* mode of punishment is much recommended for its wholesome effects upon the minds of the beholders, the only legitimate object of all punishment. Let, say they, a woman convicted of stealing children, be placed in a conspicuous place, with the figure of a hollow child suspended round her neck, into which weights may be put, to annoy her in proportion to the atrocity of her offence. Now, here they forget one principle of human nature, which would, as men are at present constituted, operate to counteract the whole effect of this penal exhibition. Men—all men, as at present made, would laugh vehemently, instead of feeling great terror, at such a grotesque exhibition of the true principles of penal justice reduced to practice. And if men are to be made anew, so as not to laugh at such follies, it would be as easy at once to make them without the propensity to steal children. Again—Jury trial is undervalued on account of its imperfections; and the administration of justice is to be intrusted to judges, irremovable, except on proof of misconduct.

But it is all the while forgotten that we must, as long as the nature of man remains feeble and corrupt, expect judges to share these defects ; that the control of a jury can alone afford a constant security against them ; and that were men no longer such frail and faulty creatures, the institution of both judges and juries would be superfluous. Furthermore, say the Utilitarians, why perplex yourselves about patronage and government influence in filling up offices ? Establish, by your code, the qualifications required for candidates, and then let all places be offered for sale to the highest bidders. Now here, we say, they wholly overlook the tendency of men to follow corrupt courses for their personal interest ; the extreme difficulty of preventing individuals from imitating the state, and selling their voices upon the question of qualification, as the state avowedly does its preference among the qualified ; the impossibility of laying down certain rules as to the qualifications required for office,—as, for example, how much acuteness, sagacity, disinterestedness, industry, shall entitle a man to be promoted ; the certain effect of the venal plan to exclude all competitors except the wealthy : so that the philosopher, while he fondly dreams that he has invented an easy rule of selection, and compounded a specific against abuse of patronage, has in reality, by totally overlooking the nature of men, contrived the most efficacious means for excluding all merit and honesty from the public service, and

making the dominion of the most gross, and sordid, and impudent corruption, universal and perpetual, insomuch that it may fairly be doubted whether, under such a system, any human society could be held together twelve months.

Something of the same oversight is committed by these ingenious and daring speculators, upon what are termed constitutional questions. First, they deny the existence of such a quality in any measure or plan, as is by other men called *constitutional* or *unconstitutional*. This means, say they, only something which somebody, for some reason, likes or dislikes. It is not lawful or unlawful; for it is, avowedly, not to be tried by its legality. Therefore it means nothing. Cannot they comprehend how a thing may be wrong, as inconsistent with the spirit of our political system, which yet the law has not prohibited? Thus judges may lawfully be promoted from inferior to higher stations on the bench. But is it not wrong to make this the rule in practice, which should be the exception? The Chancellor may be a private or a common person, not bred to the law; but were he often so chosen, the administration of justice would suffer severely. The King may levy troops if he can pay them; and his foreign dominions and his savings may enable him to keep more on foot than Parliament has voted, though he cannot punish them for mutiny and desertion. Would not a minister be answerable as for giving unconstitutional



advice, who should recommend such a step to his sovereign? Nay, if Parliament were to vote twice as large an army as the public service demanded, and twice as large a civil list as the dignity of the crown required, have the words no sense by which all thinking men would condemn such resolutions as contrary to the spirit, and dangerous to the existence, of the constitution—in one word, as *unconstitutional*? Yet by the supposition they would be legal; for the legislature itself would have sanctioned them.

Next, the philosophers of whom we are speaking, (and, considering their great talents and important services, more in sorrow than in anger,) hold exceedingly cheap all appeals to the sanction of past ages, that is of experience, and to the authority of other times, and of men wise in their generation. Are they well advised in this course? Is it nothing in favour of any institution that it has existed so long? Does not its endurance at least show the strength of its parts, the solidity of its foundations, and the harmony of its arrangements? What signifies it, say our speculators, that men more ignorant than ourselves, and less experienced, adopted such a scheme? But does it become us to brag of our great experience, if we shut our eyes to the experiments of those who preceded us? What the better, then, are we for having lived after them? We may admit that the mere fact of any establishment existing, or having long existed, is not suffi-

cient reason for holding it sacred, if its consequences are plainly hurtful. But where its effects are very doubtful, and the good hangs nearly in even balance with the mischief, the ancient origin and long continuance of the institution ought clearly to decide in its favour. Its mere existence is something; but the adaptation of so many other things to it, the fact of so many other parts of our system being founded upon it, or connected with it, renders the change prejudicial and dangerous, unless it be called for by some manifest expediency.

There is, however, another light in which the subject never is viewed by those theorists, and one of great practical importance. Whatever be its foundation, how great or low soever its claims to the approval of rational and wise men, the tendency of the human mind to attach itself to any institution of long continuance, is an undeniable fact; it is as much the part of the nature of man to become fond of what has long existed within his knowledge, to feel a prepossession in favour of any establishment he has been long accustomed to, as it is a part of his nature to bear more easily, or do more readily, that which he has been accustomed to suffer or to perform. Indeed, the force of habit is one of the most marked features in our nature, and from it the kind of attachment we are speaking of mainly springs. Can anything be more wild—nay, more truly unphilosophical, than to disregard this striking, this almost irresistible propensity of



human nature, while framing laws and devising systems for the government of human beings? Is the omission a less oversight than that of the engineer, who should forget that the atmosphere is endowed with resistance? Nay, is it not more akin to his blunder, who should forget that matter gravitates? Yet this is not only the oversight of our philosophers; it is with them a form of faith: as if the mechanist should begin his discussion with the postulate, that bodies do not attract or repel one another.

The learned and sagacious author of the work before us belongs not to this school; or if he does acknowledge its doctrines, it is only to endue him with the strength of mind, the firmness of purpose, which disregards all authority when balanced against reason, and examines the most generally received opinions with a determination to adopt them, or reject, solely as they shall be found entitled to credit upon their own merits, regardless of the high names by the authority of which they may have been sanctioned. Many things he finds laid down by antiquaries, more by historians, and not a few by eminently learned and slavish lawyers, which have no warrant in the true history of our institutions; and all such errors he exposes with the unflinching steadiness of purpose, which acknowledges only truth for a master. He has, accordingly, produced a work which must command general assent, and be the manual of those who regard with inter-

est the antiquities of the constitution. The minute accuracy of legal learning which its pages display throughout, must have a great effect in recommending them to the professional lawyer, who will be forced to admit that, but for the want of "addition" in the title-page, the treatise might have been the work of a practising lawyer.

The Inquiry opens with a striking and succinct statement of the regal power, as described by the abstract theory of our constitution, which clothes the monarch with every degree of power, and every kind of perfection. According to this theory, he is absolute ruler of the state ; supreme judge among its inhabitants ; sole owner of its land ; commander of its forces ; representative of its existence abroad ; fountain of its honours. He is also, in the eye of the same law, immortal, infallible, everywhere present, and incapable either of doing or meaning wrong. The person invested with such mighty authority is, no doubt, merely ideal ; he is a corporation, and a creature of legal theory ; and in practice, his power is checked, and his defects supplied, in various ways ; for he cannot act in any way without some adviser, or some instrument answerable for what is done ; so that the power which in the contemplation of law is supreme, in practice is exceedingly limited. The same scheme may be traced in the polity of all the European nations which arose out of the ruins of the Roman Empire. The language of the law is everywhere nearly the

same ; everywhere, too, the sovereign has claimed the rights theoretically ascribed to him, and attempted practically to enforce them : everywhere he has, at different times, met with resistance, grounded upon the usages of the state ; but this resistance has been attended with various fortune, leaving in some nations the crown, and in one or two the people, victorious.

Whence has this fundamental notion of regal supremacy been originally derived ? Not certainly, Mr. Allen contends, from the German tribes, the fathers of all the Gothic monarchies—for they acknowledged in their sovereigns only leading captains in war, and councillors in peace. But he justly, in our opinion, traces the pernicious and slavish principle to the Roman Empire,—a system of the most unmixed despotism, both at home and abroad, that the world ever saw.

“ It was the doctrine of civilians that the Roman people had transferred to their emperor the whole power and authority of the state, in consequence of which he became the sole organ and representative of the commonwealth. Whatever he pleased to ordain, was law. Whatever he commanded, was to be obeyed. These maxims had been theoretically established and practically enforced for ages when the empire became a prey to the Barbarians. The conquerors, accustomed to different notions of government, were not inclined to part with the liberty and freedom from restraint, which they had enjoyed in their native woods. But the new situation in which they were placed, their dispersion over a vast territory, amidst nations they had subdued and plundered, made it necessary, for their common safety, to strengthen the arm of government, and intrust to a few what had formerly been the property of the whole. In practice, they gave up as little as possible of their ancient independence, and when roused



by a sense of real or imaginary wrong, they were ready at all times to assert with their swords the rights they had inherited from their ancestors. But, in the changes that became necessary in their written laws, in the instructions to public officers for the administration of their internal government, and in the legal forms required for the secure possession and transmission of property, to which they had formerly been strangers, they were compelled to have the aid of provincial churchmen and lawyers, the sole depositaries of the religion and learning of the times. These men, trained in the despotic maxims of the imperial law, transused its doctrines and expressions into the judicial forms and historical monuments of their rulers; and thus it happened, that if the principles of imperial despotism did not regulate the governments, they found their way into the legal instruments and official language of the Barbarians. An imaginary King or prince was created, in whom, by a legal fiction, was invested all the power and majesty of imperial Rome. The same names were even affected. The Barbarian, who had recently exchanged his title of *heretoga* for that of King, was persuaded to style himself Basileus, in imitation of the Eastern emperors, or to prefix the appellative Flavius to his name; his sons and cousins were called Clitones or illustrious; his servants became Palatine officers, and his crown an Imperial diadem."

It was thus that the institutions of Roman despotism were introduced, its legal ideas inculcated, and its servile language naturalized, among the Barbarian conquerors of the Empire. The laws of Rome continued in force; in many countries they finally predominated over the original customs; and in all entered largely into the systems of jurisprudence framed for the government of the people. "Is it then," our author asks, "to be wondered at that the political maxims and principles of her government insinuated themselves into the states erected on her ruins, and tainted, if not the sub-



“ stance, the forms at least and language of the  
“ public law ? ” But it by no means followed that  
the Barbarians, accustomed to freedom, and ignorant of kingly supremacy, submitted to the reality of despotism, because its forms and language were borrowed from Rome, where both the name and the thing were united. “ The Barbarian, who had  
“ justice done to him in the ancient tribunals of  
“ his nation, inquired not in whose name it was administered. If he obtained the lands he wanted,  
“ it was indifferent to him in what form they were  
“ granted. He received them from the public authorities of the state, and cared not whether, in  
“ the act of donation, they were described as gifts  
“ of the king, or of the kingdom.”

After describing the various ways in which the Kings of the Barbarians delighted to ape the Roman Emperors, our author thus proceeds to show how wide the difference was between the Roman theory of these monarchies, and the Gothic practice :—

“ But, amidst the honours and decorations with which royalty was clothed by its flatterers and admirers, the rough garment of the Barbarian was seen to peep from under the borrowed purple of the empire. The real King, to whom these imposing titles and high-sounding claims were attributed, remained, as before, the chief of a warlike and turbulent people, regardless and hardly conscious of this fictitious change in his condition. The ideal King of the churchmen and civilians was an absolute prince, in whom were centred the whole power and majesty of the state. The real King, limited in his authority by ancient usage, depended on his personal qualities for the degree of power he pos-

sessed ; and when seduced by his imaginary dignity to extend the bounds of his prerogative, he had not unfrequently to pay, with his life or deposal, the penalty of his rashness and presumption. After a time, however, the language of adulation, repeated in every act and instrument of government, produced its effect. Men, accustomed to hear their prince described as the source and depositary of their laws, began to think there must have been some ground for the assertion. The real power of the King, as general in war, and chief magistrate in peace, when seasonably enforced and skilfully improved, enabled him to prosecute, on many occasions with success, his encroachments on the ancient usages and privileges of the nation. Order was maintained and justice administered in his name ; and as respect for order and justice gained ground, his subjects, who considered themselves indebted for these blessings to his care, were often induced to acquiesce in pretensions, and submit to usurpations, which had no other origin than a theory of government founded on fiction, borrowed from a foreign law, and fortified by time, because it had been suffered to pass without contradiction by those who, rejecting its authority in practice, were hardly aware of its existence in words. After many a struggle between liberty and prerogative, the result has been in England that the real power of the King has been limited and defined by constitutional law and usage, but that the old attributes are still ascribed to him in law books ; that an incongruous mixture of real and imaginary qualities has been formed, which has been called the union of his natural with his mystic or politic capacity ; and that many privileges and peculiarities have been assigned to him in his natural person, for reasons derived from his ideal or politic character."

The pious sycophancy of churchmen carried the title of Kings a step higher than even the profane adulation of the Romans, who deified their princes, had ventured to do. Those holy slaves deduced the royal authority, not as the civilians had done from a grant of the people, divesting themselves of all rights, but from the gift of God himself, by whose grace the King himself was said to reign.

He was anointed with oil, consecrated by a priest, and saluted as the vicar or vicegerent of Christ. No matter by what steps he had mounted the throne, through what slaughter of its rightful occupants, all deriving the same title from the same God. As soon as the sceptre was in his hand, he held it by divine right ; every text in the New Testament, inculcating submission, for the sake of peace, to the existing government, was pressed into the service of the prince, as if it had been devised for the support of regal authority alone ; and even the denunciations *against* kingly government by the prophets of the Old Testament, were cited to show the sinfulness of opposing the regal will.

Such being the origin of the attributes given to the ideal person of the sovereign, our author proceeds to show how, notwithstanding their admitted speculative nature, they have warped the judgment of lawyers and antiquaries, respecting the actual practical rights and prerogatives of the real King, in-  
somuch that many of the latter have been surreptitiously introduced and established under the colour of the ideal prototype.

Many instances are given, familiar to most legal readers, to illustrate this kind of confusion or transference, whereby the two capacities, natural and politic, of the King, are mixed together, as the one is considered in the premises and the other in the conclusion. Thus the King is supposed to be at all times present in all courts ; and upon this theore-



tical fiction is grounded the practical consequence that he cannot be non-suited like a common party ; because that operation consists in his being summoned to appear, and making default. So he is perfect and cannot be guilty of *laches*, or neglect of his rights ; and therefore, at common law, those rights could never be lost by any length of non-usur, nor could any length of possession secure others against his claims. He can never die ; and therefore the same gift of lands to him, which would give a common person only an estate for his life, gives the King a fee simple, for his successors are comprehended in himself. These things are familiar to legal students ; but we are now approaching the parts of this Inquiry which are calculated to throw new and valuable light upon the subject, and to prove how little the prevailing notions of many lawyers are correct, upon the high antiquity of the prerogatives, at different periods of our more recent history, claimed by the crown. And here the learned author first mounts up to the Anglo-Saxon times.

By the ancient laws of Kent, theft from the church was to be redeemed by paying twelve times the value of the thing stolen ; from the Archbishop, eleven times ; from the King, or a person in priest's orders, nine times ; and from a common layman, three times. Breach of the peace in a town belonging to the King or Bishop, was fined 120 shillings ; in an ealdorman's town, 80 shillings.



The *mundbreach* (a violation of protection) of the King and Archbishop was the same in Kent; by the law of the West Saxons it was £5 for the King, and only £3 for the Prelate. The *weregild* (or compensation for the murder) of a common person of the lowest class was 200 shillings; of a thegn, 1200 shillings; of the King, 7200 shillings; but as much more was payable to the state for the King's death, beside the weregild which went to his family. Among the North Angles and the Mercians, the King's weregild, which went to his family, was the same with that of the Ethelings, or princes; and as much more went to the state: the whole sum was £1181 5s. sterling, that of an ealdorman being about one-fourth as much.

Mr. Allen justly concludes from hence, not only that the immeasurable distance at which the King is now placed above his subjects, was little known in the Saxon times, but that the best-established and most important principle of our law of prerogative, the inviolability of the royal person, was wholly unknown in those ages. The monarch had the same kind of security for his person that any one else had, though to a larger amount. Indeed, our author very reasonably considers that the sanctity of the person originated in the relation between the *hlaford* or lord, and the man, which was held peculiarly sacred, and the obligations of which were reciprocal, implying protection on the one hand, and allegiance on the other. This view is,

we think, strongly borne out by the fact, that "the laws called Alfred's," and certainly collected by him, declare the compassing the death of a hlaforð by his man, to be irredeemable by any weregild. The same protection is given by those laws to the King; the compassing of his death by his man, is inexpressible. In process of time, this was extended by the introduction of the principle that the King is as it were the hlaforð of all his subjects; and hence treason is to this day, by the law of England, of two sorts—high treason, or that committed against the King by his man; and petty treason, or that committed against a master by his servant, evidently the remnant of the treason committed by the man against his hlaforð; but since the statute of Edward III. the crime consists in the intention only, where the King is the object; where a common person is concerned, the purpose must be carried into execution, otherwise the treason is not committed.

No maxim of our constitution, not even the inviolability of the Sovereign's person, is better established than the hereditary descent of his crown; yet in the early times of the monarchy it was elective; and the form of election, as often happens, long survived the reality of a choice. During the whole period of the Saxon monarchy, it was strictly elective; though generally among the members of one family; and so deeply rooted was this principle in men's minds, that the Conqueror thought fit

to undergo the ceremony of an election after he reached London. The three Kings who succeeded were raised to the throne by their followers; and Henry II. was made King by force of his treaty with Stephen, ratified by the Barons. His eldest son, to secure his succession, was crowned in his lifetime, and predeceasing him, left Richard I. to succeed; who, Mr. Allen observes, was the first King that took the crown by descent only, and without any interval after the decease of his predecessor. Between his death and John's accession there was an interregnum of nearly two months; he was chosen King, and dated his reign from his coronation, and not from his brother's death. Henry III. succeeded his father, but after an interval of nine days. At his decease, Edward I. succeeded peaceably, but dated his reign from his being recognised as King at his father's funeral, four days after he died. Since that time, 1271, there has been no interregnum, unless when the order of succession was broken by changes of dynasty.

The slow steps by which the doctrine of allegiance attained its present form, afford another illustration of the limited authority originally enjoyed by the Kings of this country. The oath of unconditional allegiance, unknown in form as in substance among the Barbarians, was borrowed from Rome, where the slavish people renewed it to each succeeding Emperor. But as it did not suit the Gothic taste for freedom, the monarch softened



it by taking an oath himself, which made the obligation reciprocal; and that a breach of promise on his part absolved the subject from his obligations, appears from a capitulary of Charles the Bald, expressly authorizing rebellion in the event of his violating his duty. To the Roman allegiance, thus made mutual, was added a relationship peculiar to the northern tribes, that of vassalage, or the connexion between a follower and his military chief; and this allegiance, or fealty, and the return made for the chief's protection and favour, was dissolved by his violation of the covenanted duty towards his man. The King had his immediate vassals, who, as well as his men, owed him fealty like those of the other great lords, of whom he was the principal; but the subject, in general, only owed him allegiance without homage.

Among the Anglo-Saxons, though there are instances of fealty being occasionally sworn to the Sovereign, there was not, as among the Franks, a regular oath taken by the subject; but the King always took one at his coronation. The oath taken by subjects to the King was, in England, always the conditional and mutual oath of fealty and homage, by a man to his hlaford; and our author gives it entire as follows: "I shall be faithful and true to N, and love all that he loves, and shun all that he shuns, conformably to the laws of God and man, and never willingly, nor wittingly, by word or deed, do aught that is hateful to him, on

Oath of  
Fealty




condition that he keep me as I am willing to earn, and all that fulfil, which was agreed upon between us, when I submitted to him and chose his will."

The most ancient oath of allegiance is that urged by the Laws called the Confessor's, in the tenth century: one of these expressly commands subjects to "swear such fealty to King Edward as a man owes to his lord." It is clear, therefore, that allegiance was held to be conditional. There is even an example on record of the condition being expressed; for Ethelred II., after being dethroned and banished by the Danes, was afterwards taken back by his subjects in 1014, upon a pledge of better conduct, and a promise "to be towards them a faithful hlaford." There are many instances of the council or *witan* dethroning kings for breach of their obligations. It deserves also to be mentioned, that the oath which vassals took to their mesne lords, contained no exception or qualification whatever in behalf of the King, should the lord and the King quarrel; and in the kingdoms of the Continent as well as in England, the lord could in such cases command his men's service against their common sovereign. This was remedied by William the Conqueror, who made the oath of fealty to the crown be taken generally, and without any reserve; and his example was followed in other countries. But in all the obligations of allegiance, fealty to the king was held to be dis-

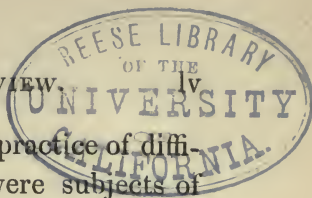
solved by his breach of duty to the people. Thus, in France, the oath to Philip Augustus contains a qualification—"So long as he shall do justice in his court;" and St. Lewis declares rebellion justified against the King who denies justice, pronouncing the fief of the vassal forfeited who refuses to serve his mesne lord in the prosecution of the resistance. Mr. Allen traces the same remarkable principle in the English institutions, although the language is not so precise among our lawyers as among those of the Continent. *Diffidation* was the term used of old to designate the notice given by parties bound together by reciprocal ties, that the union was broken off. It is translated *defiance*, but originally meant a notice. Thus Henry III. sent a formal diffidation to William Earl Marischal, declared him out of protection, and made war on him. The Earl afterwards, on being asked to return to the King's protection, says, "I am no traitor; the King has, without judgment of my peers, deprived me of my honours and laid waste my lands; twice he has put me out of his protection, while I demanded and was ready to abide by the judgment of my peers in his court. I am no longer his man, and by his own act have been absolved from the homage I had rendered him. It is therefore lawful for me to defend myself, and to resist the evil counsellors that surround him, by all the means in my power."

The confederate barons before the battle of Lewes

broke off their allegiance to the same king, and gave him battle, upon his declaring them out of his protection, because they denounced his advisers as public enemies. When Edward II. was deposed, Tressell first approached him on the part of the lords spiritual and temporal, and withdrew their allegiance; and a like ceremony was observed towards Richard II. Mr. Allen, in one of his valuable and learned notes, has given the speeches made upon these memorable occasions. The persons sent with the diffidation to Richard II. were eminent lawyers, Thirnyng, Chief Justice of the King's Bench, and Markham, a puisne judge of the same court. The chief was the spokesman, and thus addressed the King: "And we procurators," he adds, "of all thes states and poeple forsayd, os we be charged by him and by hir autorite gyffen us, and in hir name, zeld zowe uppe, for all the states and poeple forsayd, homage, liege and feaute, and all ligeance, and all other bondes, charges and services that long ther to. And that non of all thes states and poeple from this time forward ne bere zowe feyth ne do zowe obeisance os to ther Kyng." The learned judges prefaced the notice which they thus served upon his Majesty, by reading to him "certain articles of defaute in his governance, for which the Parliament had adjudged him to be deposed, and pryved of the astate of Kinge, and of all the dignitie and wyreshipp, and of all the administration that longed ther to."







Our author, after referring to the practice of diffi-  
dation in use among those who were subjects of  
both France and England, and the analogous rights  
of the Spanish proprietors to throw off their natural  
allegiance upon notice, traces the doctrine of allegi-  
ance; which after much struggle, and long stand-  
ing doubts, was, in James First's reign, decided by  
the courtly spirit of the judges and crown lawyers  
in favour of its being due to the person, and not to  
the place of the sovereign. But this anomaly in  
the constitution, which was calculated to subvert  
every principle of liberty, by denying all right of  
resistance, was fated to enjoy a shortlived triumph.  
In 1642 the two Houses of Parliament declared the  
sounder principles of the monarchy, but pushed  
them to a fatal excess; the Restoration abrogated  
this declaration, and put the prerogative upon  
the footing of passive obedience: the Revolution,  
founded upon the right of resistance, once more  
expunged this slavish doctrine from our statute  
book, and the principle was fully recognised, to  
use Blackstone's words, "that resistance to the  
person of the King is justifiable, when by his mis-  
government of the kingdom the existence of the  
state is endangered, and the public safety proclaims  
such resistance necessary." These rights he calls  
"inherent, (though latent) powers of society, which  
no climate, no time, no constitution, no contract,  
can ever destroy or diminish." (1 Com. 245, 251.)

Right to  
rebel-  
Blason



This interesting and very learned deduction is thus closed :—

“Notwithstanding the zeal and success with which the monarchical theory was diffused over Europe by lawyers and churchmen, there have been states where resistance to the King was, in certain cases, sanctioned by law. In Castille, if the King attempted aught to his own dishonour, or the prejudice of his kingdom, his subjects were entitled and even required by law to resist his will, and remove evil counsellors from his person. In Aragon the nobles enjoyed what was called the privilege of union, by virtue of which they were entitled to confederate against the crown, where any attempt was made by the King to invade or encroach on their liberties. The union was a legal and constitutional association, authorized and regulated by law. It issued its mandates, as a corporation, under a common seal, and could make war on the King without exposing its members to the penalties of treason or rebellion. In England we have one solitary instance of a similar institution. By one of the provisions contained in the Magna Charta of King John, twenty-five barons were to be elected, whose duty it was to take care that the liberties granted by that monarch were observed. If any infringement of those liberties took place, or if any injustice or oppression was committed by the King or his servants, any four of these barons might remonstrate to the King, or, in his absence, to the justiciary, and if redress was not obtained within forty days, the whole twenty-five, or a majority of them, were empowered to make war on the King till relief was given to their satisfaction. All persons were bound to assist this commission of twenty-five in the discharge of their duty, and the only limit to their hostilities was not to touch the persons of the King and Queen or their issue. This guarantee of our national liberties, which the cruel and perfidious character of John had probably suggested, was omitted in the charter of his son, and therefore forms no part of the Magna Charta of our statute book.”

The history of judicial rights and institutions affords our author similar illustrations of the limited powers in all ages enjoyed by the crown, though

the Saxon Kings were sworn to assist personally in administering justice, and this practice continued long after the Conquest. But in those times he could also be sued in his courts like a common person. It was so before the reign of Edward I., in whose time the practice of obtaining redress against him by petition was first introduced. A judge is reported in the year book of Edward III. twice to have said that he had seen a writ beginning "*Præcipe Henrico, regi Angliæ.*" This shows that he could be commanded, in spite of Finch's loyal exclamation, "Who shall command the King?" and that he had a superior, in spite of Bracton's civilian and Romish doctrine, that God only is over him. The author of *Fleta* more truly and more honestly says, that "the King has a superior in the law which made him King, and a superior in his court, his earls and barons." To the same purpose is the restraint, by means of appeal, upon the possible negligence or corruption of the crown in not prosecuting or in pardoning offences.

The next subject of enquiry is the legal fiction, which holds all real property to be holden directly or indirectly of the crown—a principle of alarming sound, and indeed of import no less portentous, if it had any foundation whatever in the fact. But our author, little disposed as he in general is to spare the lawyers and legal antiquaries, candidly admits that they have never maintained this doctrine as having the least foundation in reality, with

the single exception, perhaps, of Madox, who most absurdly says "that William the Conqueror was seized of all England in demesne; that he retained part of it in his own seisine, and other part thereof he granted and transferred to others,"—a proposition refuted by every page of history, and every report of judicial proceedings at and after the Conquest. Our author shows at much length that the land of the community never, in the Saxon times, belonged to the King or chief; that when any conquest was made by the northern nations, the lands were divided among the leaders and their followers, and part reserved for the *fisc* or state, as well as part given to the chief leader or King; that by degrees the first holders of the land surrendered it to powerful proprietors, from whom they again received grants of it, to be holden under their authority and protection, in return for which they rendered certain services; and that thus alodial possessions ceased generally, and were supplanted by feudal tenures. This was the history of landed property all over the Continent, and England formed no exception to the rule. The Anglo-Saxons distributed the lands in part to individuals, and reserved the residue to be at the disposal of the state. The opinion of Mr. Allen is, that the former constituted what was termed *Bóc-land*, and held by book or charter; the latter was termed *Folc-land*, land of the folk or people, and continued at the disposal of the *folc-gemót*, or court of the district,



reverting to the community after the expiration of the period for which it was granted out. The *bôc*-land might be held by the King as well as by other individuals ; the *folc*-land was subject to various burdens of a public nature. The *bôc*-land was held in free and absolute property, unless in cases where it had been originally granted upon condition of certain payments. Our author demonstrates, by the clearest evidence, the error of those antiquaries who have considered *folc*-land as held by the common people, or by those in a state of villenage ; and shows that the same person possessed, in different places, and by separate titles, land of both descriptions. The whole of the dissertation on the tenures of land is highly interesting and full of learning ; it certainly places this subject in a new light, and deserves the best attention of antiquaries and lawyers. But the matter most to our present purpose is that which regards the crown. The King, it seems, held land exactly as the subject did. 'This is clearly proved by King Alfred's will ; from which it appears that Alfred had had the rights of himself and his family to the landed inheritance of his grandfather Egbert determined in the courts of law, and that he afterwards had been empowered by a decision of the *witan* to make a new settlement of his share.

Mr. Allen demonstrates very fully that *bôc*-land might be held by any tenure, under any conditions, and by any class of persons ; and he illustrates the



varieties of those holdings. It might be transferred, unless fettered by the terms of the grant ; and it continued to be *bôc-land* as long as it passed by deed. When the conveyance was without charter, it became what was called *læn-land*. *Folc-land* became *bôc-land* by being granted out to individuals ; and this gift was at first the act of the national assembly, and afterwards of the King, but always with the advice and assent of the assembly, or witan ; and while all the charters contain a statement of this consent, instances are not wanting of such grants being revoked as invalid for want of it. Some of the *folc-land* was held by the thegns, or persons employed in military service, and called *thegn-land* ; some by those engaged in the civil administration, the ealdormen and *gerefan*, or reves, and this was called *reve-land* ; and some part was set apart for the expenses of the royal household, and said to be held in *demesne*, or let out to farm. Frequently *folc-land* was granted out, subject to certain services or payments, for the King's use : and this was the origin of the right of *purveyance*, afterwards so shamefully abused in the times of the Plantagenets and the Tudors. The land first known by the name of *folc-land*, afterwards came to be called *Terra regia* and crown land ; but the expression comprehended both what belonged to the King for his own use ; what he held as private property by a title unconnected with the crown ; and what he was only nominally

the owner of, and could not alienate, or in any way affect without the consent of the national council. In process of time this distinction was obliterated : it became a maxim of the English law, that all lands holden by the King, even those which descended to him from relations unconnected with the crown, were held by him *jure coronæ*, and made part of the crown property ; and he obtained, on the other hand, an absolute control over the crown property, unfettered by the Parliament in all respects, except that of devising it by will. The patrimony of the crown was thus dilapidated with scandalous profusion, until the statute of Anne restrained the power of alienation to grants for three lives, or 31 years ; and it was only by a strange anomaly, that, in the reign of George III., the ancient Anglo-Saxon scheme was restored ; the crown lands being vested in the public, and the King enabled to hold lands by purchase, in his private capacity, and to devise them by will.

Such, then, was the Royal Prerogative in all ages of our history—not absolute by law, though oftentimes stretched by violence and usurpation—not monarchical in the continental sense of the word,—but limited and restrained by the rights of the people. “Every one,” says Mr. Allen, “has read with disgust the indecent attempts of churchmen to impress a character of divinity on Kings, to inculcate on their subjects the obligations of passive obedience and non-resistance as religious

duties, to found their title on a delegation from heaven, and, with impious flattery, to exalt them above the Almighty, by maintaining, that the 'most high, sacred, and transcendent' of relations is the 'relation between King and subject.' Every one has heard of the distinction made by judges and lawyers, in the times of the Tudors and Stuarts, between the ordinary and extraordinary, or absolute, as they were pleased to call it, prerogative of the crown. Every one knows the abuses introduced into our government, under pretence of the sovereign power attributed in law books to the King of England. And every one must admire the resolution and firmness of our ancestors in combating and successfully resisting these pernicious doctrines." Sir Thomas Wentworth, afterwards Earl of Strafford, friend of the crown though he was, opposed the addition propounded in the House of Lords to the Petition of Right, with these remarkable words, "Let us leave to his Majesty to punish malefactors, but these laws are not acquainted with sovereign power."—"Sovereign power," says the illustrious Coke, the most learned of lawyers, yet one of the great patriarchs of English liberty,—“sovereign power is no parliamentary word. Magna Charta and all our statutes are absolute, without any saving of sovereign power. Let us take heed what we yield unto. *Magna Charta is such a fellow that he will have no sovereign.*”—“I know (said Pym)



how to add sovereign to the King's person, but not to his power. We cannot *leave* to him a sovereign power; for he was never possessed of it." We subjoin the concluding passage of this admirable treatise, as pregnant with sound wisdom, breathing the genuine spirit of the Constitution, and conveying, in language at once just and striking, the practical results of our author's profound researches, and inculcating a truth, at all times of the last importance to the well-being of the community:—

"In modern times the prerogative of the crown has been so strictly defined by law, and since the Revolution there has been fortunately a succession of Princes so little disposed to contend for an illegal extension of its boundaries, that though the old doctrines of absolute sovereignty and transcendent dominion still disfigure our law books, they are little heard of elsewhere. Occasionally, however, it happens, that in parliamentary discussions, assertions are hazarded of latent prerogatives in the crown, which are supposed to be inherent in the very nature of sovereignty. That such pretensions are unfounded, it is not difficult to make out. Every government that is not established by military force, or founded on the express consent of the people, must derive its authority from positive law or from long-continued usage. But, where law confers any power, it prescribes and directs the mode of administering the authority it bestows; and what has been given by usage, is necessarily regulated by usage in its exercise. A prerogative founded on usage, which cannot be enforced because it has fallen into desuetude, is a contradiction in terms. No one will pretend, that any prerogative of the King of England is founded either on military force or on the express consent of the people. Every prerogative of the crown must therefore be derived from statute or from prescription, and in either case there must be a legal and established mode of exercising it. Where no such mode can be pointed out, we may be assured that the prerogative so boldly claimed is derived nei-



ther from law nor usage, but founded on a theory of monarchy, imported from abroad, subversive of law and liberty, and alien to the spirit as well as to the practice of our constitution. In England there are no latent powers of government, but those possessed by the supreme and sovereign authority of the state. The King is our sovereign lord; but he does not possess the sovereign authority of the commonwealth, which is vested, not in the King singly, but in the King, Lords, and Commons jointly. When we hear of a prerogative inherent in the crown, which the King has no legal means of exercising, we may be certain that it has no existence but in speculative notions of government. Emergencies may arise, where it is necessary for the safety of the state to commit additional powers to the persons intrusted with its defence. But when such cases occur, we are to be guided by considerations of reason and expediency in the powers we confer, and not by vain and empty theories of prerogative, which the very act we are called upon to perform proves to be futile and unfounded."

Independently, however, of this practical inference, we hold the light which this book throws upon the early history of our Constitution to be of the greatest importance. It shows us that, whatever the slavish propensities of priests or lawyers may have affected to believe, absolute power never was of right, and by law, naturalized in England; that freedom never was an exotic or a stranger, but the birthright and inheritance of Englishmen; that the presumption where no law or usage appears is always in favour of liberty, and against royal prerogative; that it is in no case for the subject to show his title to be free, but for the monarch to prove his right to oppress. Those who deem all former times to have been less enlightened than our own, are, generally speaking, correct in their

assumptions ; but it by no means follows that, the farther we go back into history, the less advanced we shall find the independence of the people, and the more absolute the rule of the prince. Men are not by any means less jealous of their rights in early than in advanced stages of society. It often, indeed, happens, that the same refinements which enlarge the intellect and polish the manners of a community, relax its love of independence, and prepare the way for encroachments upon its rights. And the proposition is anything rather than accurate, which regards the liberty of early times as on a level with their civilization.

*Rapport fait à l'Académie des Sciences Morales et Politiques  
de l'Institut, par M. Bérenger, Membre de cette Académie.*

Séance du samedi 29 novembre 1834<sup>1</sup>.

[*Prefixed to the French translation of the 'Inquiry,' by Paul Guillot.*  
Paris, M.DCCC.XXXIV.]

LES recherches de M. John Allen, sur l'origine et l'accroissement de la prérogative royale en Angleterre, méritaient de fixer l'attention de l'Académie, autant par l'importance du sujet que par la supériorité avec laquelle l'auteur l'a traité.

C'est en effet, messieurs, une chose digne d'intérêt que d'envisager dans ses commencements une institution dont la naissance remonte presque de toutes parts à l'établissement des sociétés ; de suivre ses progrès chez celui de tous les peuples modernes qui a porté le plus loin le sentiment de son indépendance ; et de voir comment cette institution, perfectionnée avec le temps, s'est montrée protectrice de tous les droits et est devenue le fondement le plus assuré de l'ordre public.

Un point d'histoire à constater qui présente en même temps un doute philosophique à résoudre, est, messieurs, cet assentiment presque unanime des nations à reconnaître un pouvoir unique, et à

<sup>1</sup> Lord Brougham, associé étranger de l'Académie, assistait à la séance.

s'abandonner à sa direction suprême, sinon en toute et toujours, du moins dans ces moments de crise où le péril réunit les volontés.

Cette soumission à l'autorité d'un seul est-elle dans la nature de l'homme? ou doit-on conclure des faits qui la démontrent, que l'unité du pouvoir soit une condition des sociétés?

C'est là, messieurs, une des plus graves questions que la philosophie puisse adresser à l'histoire.

Le besoin d'ordre est si puissant chez l'homme civilisé; les peuples comme les individus obéissent tellement à cet instinct de conservation qui est la loi commune de leur existence, que l'institution la plus propre, soit à servir de garantie à la possession, soit à maintenir la paix de la cité, s'est presque en tous lieux formée comme d'elle-même, et qu'elle a pris sa force dans la confiante sécurité des intérêts placés sous sa tutelle.

M. Allen, avant de marquer l'origine des diverses prérogatives de la royauté, nous montre le pouvoir souverain dans toute sa majesté et tel qu'il apparaîtrait aux publicistes anglais.

Ces publicistes, comprenant le besoin de rendre respectable l'autorité souveraine, enseignèrent à l'honorer presque à l'égal de la divinité, ils lui supposèrent tous les genres de perfection, ils lui en donnèrent même de tellement idéales, qu'ils ne craignirent pas de tomber dans les plus puériles exagérations. Ainsi, selon eux, le roi est présent partout, il jouit d'une immortalité indéfinie, il est



aussi incapable de penser mal que de mal faire, et sa raison supérieure n'admet ni faiblesse ni aberration.

Les attributs de sa puissance sont également très-étendus : tout le sol de la Grande-Bretagne lui appartient ; ceux qui l'habitent n'en ont que l'usufruit. Il est le seul magistrat de la nation ; conservateur de la paix publique, les offenses faites à ses sujets lui deviennent personnelles, et c'est à ce titre que le droit de grace lui est dévolu, parce qu'il est naturel que celui qui a reçu l'injure ait le privilège du pardon.

Le roi a le commandement des armées de terre et de mer, toutes les forteresses sont à lui ; il est le représentant du royaume envers les puissances étrangères ; il fait la paix et la guerre ; il lie ses sujets par les engagements qu'il contracte et par les traités qu'il ratifie.

Sous le rapport religieux, il ne reconnaît pas d'autorité supérieure à la sienne ; il ne peut donc être soumis à aucune censure spirituelle ; de même que, dans un autre ordre d'idées, l'impossibilité où il est de faillir le place hors des atteintes de la loi commune.

Cette figure du monarque, telle que nous la représente M. Allen d'après les publicistes de sa nation, a, comme on le voit, quelque chose de surnaturel et de mystérieux qui est très-propre à frapper l'imagination et à préparer les esprits à l'obéissance.



Toutefois il n'est aucun des attributs de ce pouvoir qui ne trouve son correctif dans d'autres maximes de la loi constitutionnelle.

Ainsi, malgré la toute-puissance accordée au roi, il ne peut l'exercer que par l'intermédiaire d'un conseiller qui est toujours responsable de ses actes. S'il a le droit de lever et de commander les armées, il ne peut les tenir sur pied en temps de paix dans l'intérieur du royaume, sans le consentement du parlement ; il en est de même de ses autres prérogatives.

Qu'on ne pense pas que cette fiction, qui divinisaient en quelque sorte la royauté, fût propre seulement à l'Angleterre. On la retrouve dans toutes les monarchies de l'Europe, établies sur les débris de l'empire romain ; comme aussi on y remarque une limitation plus ou moins étroite apportée au pouvoir souverain, soit par des lois fondamentales, soit par des usages passés en force de loi. M. Allen signale chez les nations européennes deux principes contraires, constamment aux prises l'un avec l'autre. D'un côté, l'autorité royale, qui cherche incessamment à s'étendre ; de l'autre, le principe de liberté qui invoque d'anciens usages, qui oppose de vieilles franchises ; lutte incessante, dont les succès ont été long-temps divers, mais qui, chez quelques peuples, et dans la plus belle partie du continent, a fini par amener une sorte de transaction entre les prétentions du pouvoir et les exigences populaires.

Deux théories aussi opposées dérivait nécessairement de deux sources différentes. On ne peut faire remonter aux anciens Germains celle qui consacrait le pouvoir absolu ; car les tribus les plus considérables de ce peuple avaient adopté la forme du gouvernement républicain, ou si quelques-unes avaient un chef, que les Romains décoraient du nom de roi, son autorité était ou temporaire, ou peu étendue ; elle cessait le plus souvent avec le besoin qu'on avait eu d'y recourir.

Il n'en était pas de même parmi les sujets des provinces romaines ; le despotisme des empereurs non seulement n'était pas restreint, il ne cherchait pas même à se déguiser. Tous les pouvoirs, exécutif, législatif et judiciaire, étant réunis dans la même main, aucune barrière n'était opposée à la volonté souveraine, si ce n'est l'insurrection populaire, contre-poids terrible et dangereux qui apparaissait à certains intervalles, et qui devenait pour les mauvais princes une sorte de justice vengeresse.

Des deux théories qui tendaient à étendre ou à restreindre l'autorité royale, la première avait donc pris naissance dans les provinces soumises à la domination de Rome, l'autre était due au caractère indépendant des tribus germanes.

Les vainqueurs étaient sans doute peu disposés à abandonner la liberté dont ils jouissaient ; mais une fois sortis de leurs forêts, dispersés sur un grand territoire, mêlés à des peuples mal soumis, et qu'il fallait contenir sans cesse, ils sentirent la



nécessité d'armer le gouvernement d'assez de force pour assurer leur sécurité, et pour se faire obéir des vaincus. Obligés d'ailleurs d'appropriier leur législation à leur situation nouvelle, et incapables de s'acquitter eux-mêmes de ce soin, ils recoururent au clergé et aux légistes, qu'ils trouvèrent dans les provinces conquises. Ceux-ci, imbus des maximes despotiques de la loi impériale, firent passer ces maximes dans la législation, ainsi que dans les actes judiciaires et les monuments historiques de leurs vainqueurs. De là cette opposition bizarre entre les formes du gouvernement et l'esprit des institutions ; de là aussi ce langage du pouvoir absolu s'adressant à un peuple demeuré libre.

Les vaincus, le clergé surtout, plus éclairés, plus instruits que les guerriers dont ils subissaient le joug, acquirent bientôt une grande influence sur les affaires, et, quoique placés dans un rang inférieur, ils ne tardèrent pas à s'élever aux plus hautes charges de l'état.

La loi romaine elle-même, d'abord personnelle aux vaincus, triompha dans beaucoup de lieux des coutumes nationales, et c'est ainsi que les maximes du grand empire s'insinuèrent dans les mœurs et les institutions des barbares, et altérèrent ce qu'il y avait de libéral dans leur principe. Les souverains du peuple conquérant prirent bientôt les insignes des monarques de Rome. Odoacre fut flatté du titre de patrice qu'il obtint de la cour de Constantinople ; Théodoric recut d'elle, avec le même



titre, le rang de consul ; les mêmes honneurs furent conférés par Anasthase à Clovis, que ses sujets saluèrent du nom d'Auguste. Justinien abandonna même aux enfants de ce dernier tous les droits de l'empire sur la Gaule ; concession superflue, puisque depuis long-temps l'empereur avait perdu son autorité sur les Francs, mais qui paraissait sanctionner la conquête. Enfin, Charlemagne, après avoir relevé l'empire d'Occident, se décora du titre d'empereur, tout en conservant celui de roi des Francs, que Charles, son petit-fils, dédaigna bientôt, pour adopter le fastueux cérémonial de la cour de Byzance et pour prendre les noms d'Auguste et d'empereur de tous les rois d'Occident.

Les maximes répandues dans la législation et les monuments publics, ainsi que les titres donnés par la flatterie, devaient insensiblement produire leur effet. Les rois se conduisirent avec habileté, et les sujets se virent souvent amenés à acquiescer à des prétentions qui n'avaient d'autre origine qu'une simple théorie de gouvernement.

Cette théorie se fortifia avec le temps, non sans combats, on l'a déjà dit ; mais de cette lutte il est résulté pour la royauté un mélange de prérogatives imaginaires, de capacités mystiques, et de restrictions légales qui forment souvent le contraste le plus étrange.

Une prétention nouvelle surgit de ce conflit. Les empereurs romains, au dire des publicistes, et en vertu de la célèbre loi *Regia*, s'honoraient de tenir

leur autorité de la délégation du peuple ; c'était au moins un hommage rendu à ses droits : le roi des barbares, instruit par le clergé, qui cette fois abandonnait la fiction romaine, fit dériver son pouvoir du ciel, et voulut ne relever que de Dieu ; il reçut l'onction sainte des mains d'un prêtre, et quoique à cette époque il fût encore élevé sur le trône par l'élection, il se déclara roi par la grace de Dieu, prétention qui, selon M. Allen, est aussi ancienne que la période anglo-saxonne de l'histoire d'Angleterre.

Cette doctrine admise, il en découlait qu'il n'appartenait à aucune puissance de la terre de s'élever contre les actes du souverain ; que c'était un devoir religieux de lui obéir ; que la rébellion constituait un sacrilège, et que ceux qui s'en rendaient coupables étaient excommuniés et voués à la damnation éternelle.

C'est ainsi, et à quelques différences près que nous signalerons plus tard, que se forma l'autorité royale en Angleterre ; absolue dans son principe, elle reçut dans la pratique de nombreuses limitations. Les publicistes ont épuisé leur sagacité à concilier les contradictions résultant de cette capacité indéfinie et sans bornes attribuée au roi, et des restrictions qui y avaient été apportées ; mais quelles que fussent ces contradictions, ce qui est resté de l'ancien dogme de la puissance souveraine, c'est que le respect pour le prince, l'inviolabilité, je dirais même le culte de sa personne, ont passé

sans contestation dans les esprits et dans les mœurs de la nation anglaise.

Toutefois et en réalité, la distance immense qui sépare actuellement le roi de la Grande-Bretagne de ses sujets, n'existait peut-être pas au même degré dans l'enfance de la constitution. M. Allen en trouve la preuve dans la distinction établie par la loi saxonne entre les diverses classes de la société, à l'occasion de la composition qui était accordée pour les offenses. Dans beaucoup de lieux le roi n'était pas traité par la loi plus favorablement que ses sujets ; l'autorité ecclésiastique était même souvent placée au-dessus de lui. Les compositions variaient selon les divers peuples qui habitaient la Grande-Bretagne, quoique chez tous, la maxime la plus ancienne et la plus respectée fût celle qui considérait la personne du monarque comme sacrée, et qui déclarait coupable de trahison celui qui attentait à sa vie, ou qui formait des complots contre lui. Dans ces cas, néanmoins, le roi n'avait pas droit à une protection plus étendue que ses sujets, il recevait comme eux la composition, c'est-à-dire le prix de l'offense et rien de plus.

Encore faut-il reconnaître que c'était moins dans sa capacité de roi que dans son caractère de seigneur que la personne du souverain était inviolable, car rien n'était plus vénéré que les liens volontaires qui unissaient les vassaux à leurs seigneurs ; ces liens, tant qu'ils subsistaient, imposaient



de part et d'autre des devoirs auxquels l'autorité d'un long usage attribuait une sorte de caractère religieux.

Il n'y avait d'ailleurs dans les lois saxonnes aucune différence entre la trahison contre le roi et celle contre les autres seigneurs. Seulement le roi étant considéré comme le seigneur de la nation, la sûreté dont se prévalaient les seigneurs inférieurs contre leurs vassaux particuliers, lui était accordée envers tous ses sujets.

Cette législation subsista ainsi pendant plusieurs siècles ; M. Allen nous dit que dans la suite des temps et à mesure que le monarque s'élevait en dignité et en puissance, on introduisit une distinction entre la trahison contre le roi et celle contre les seigneurs. L'une fut appelée *haute*, et l'autre *petite trahison*, distinction qui existe encore aujourd'hui dans la loi anglaise.

Sous les Saxons, la couronne était élective ; à la vérité, elle résidait ordinairement dans une famille particulière, mais il y avait une liberté illimitée de choisir le souverain parmi les membres de cette famille ; l'illégitimité même n'était pas une cause d'exclusion. Il y avait ordinairement un interrègne entre la mort du dernier roi et l'intronisation de son successeur ; c'est dans cet intervalle qu'il était procédé à l'élection ; mais à dater d'Édouard I<sup>er</sup>, il n'y eut d'interrègne que lorsque la ligne successive se trouva rompue ; à l'avènement de Jacques I<sup>er</sup>, on déclara que la loi d'Angleterre n'en recon-



naissait plus, et c'est maintenant une maxime constitutionnelle qu'immédiatement après la mort du roi, son héritier a de plein droit l'investiture de la couronne.

M. Allen suit une à une, et pour ainsi dire pas à pas, depuis leur naissance jusqu'à leur entier développement, chacune des prérogatives accordées aux monarques anglais.

D'abord, et pendant l'heptarchie, les petits rois se bornaient à prendre le nom des peuples sur lesquels ils régnaient ; il en fut de même après la réunion imparfaite de ces états sous les Saxons de l'ouest. Ce fut Jean qui le premier grava sur son sceau le titre de roi d'Angleterre, et cette innovation, dont le principe est puisé dans la fiction féodale qui attribuait primitivement au roi la propriété du sol anglais, a été adoptée par ses successeurs.

L'origine de *l'alléiance* ou du serment de fidélité est également ancienne. Cet acte de soumission fut emprunté en partie à l'empire romain, en partie aux usages des Germains ; il était absolu ou conditionnel, selon que les maximes de l'un des deux peuples prévalaient.

Sous les Romains, l'armée prêta serment de fidélité d'abord au général, et après la chute de la république à l'empereur. Plus tard nul n'en fut exempt, ni les magistrats ni les citoyens ; il fut prêté non seulement à chaque avènement, il le fut encore à des époques périodiques pendant le même règne.

Après la cession que Justinien leur fit de ses droits sur la Gaule, les Francs firent revivre un usage qui favorisait leur puissance ; libres ou vassaux, laïques ou ecclésiastiques, et jusqu'aux enfants de douze ans, tous y étaient soumis.

Mais il paraît que dès le huitième siècle quelques personnes refusèrent de prêter le serment exigé ; alors pour vaincre leurs scrupules, le roi s'obligea en retour à respecter leurs droits et privilèges et à leur rendre la justice avec impartialité ; les obligations devinrent donc réciproques, et si le roi violait son serment, ses sujets étaient dispensés du leur. Charles-le-Chauve les autorisa même par un capitulaire à s'unir contre lui s'il enfreignait leurs privilèges ou s'il se rendait coupable d'injustice à leur égard.

Un autre acte qui avait beaucoup d'analogie avec l'allégeance ou serment, l'*hommage*, devait à son tour son origine aux Germains. Les chefs de ces peuples avaient auprès d'eux des compagnons ou suivants qui formaient leur cour et les accompagnaient à la guerre. Ces chefs eux-mêmes s'attachaient au monarque au même titre. Ils venaient dans sons palais avec leurs suivants, et mettant la main dans la sienne, ils lui engageaient leur foi et lui juraient fidélité ; tel était l'hommage, en vertu duquel on était reçu parmi les antrustions ou hôtes du roi. Ce titre plaçait ceux auxquels il était conféré à un haut degré d'élévation. On recevait une plus forte composition pour les injures dont

on avait à se plaindre, et, affranchi des juridictions inférieures, on jouissait du privilège de ne pouvoir être cité que devant la cour du roi.

De si grands avantages furent fort recherchés, et insensiblement il se trouva peu d'hommes libres qui ne fussent ou vassaux immédiats du roi ou vassaux des seigneurs, qui l'étaient eux-mêmes du monarque.

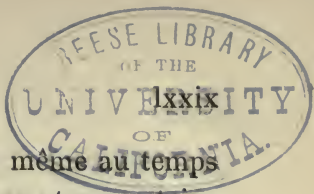
Les principaux de l'état et les vassaux immédiats du roi lui prêtaient seuls hommage ; les autres sujets se bornaient au serment de fidélité.

M. Allen rapporte la formule de ce serment, qui, quoique rédigé dans les termes les plus étendus, formait cependant un contrat réciproque, de telle sorte que si le monarque manquait à la protection sous la condition de laquelle on l'avait prêté, les sujets étaient relevés de leur allégeance ; et l'histoire de cette époque reculée offre plusieurs exemples de rois chassés de leur trône pour avoir violé le contrat.

Cependant, lors de la conquête des Normands, le caractère entreprenant de Guillaume ne pouvait se contenter d'une obéissance aussi limitée que celle qui avait satisfait les rois saxons. Ce prince força tous les propriétaires fonciers de l'Angleterre à lui prêter un serment absolu et sans condition et à devenir ses vassaux, à quelques seigneurs qu'ils appartenissent.

Dans le reste de l'Europe, il fut admis long-temps encore que les vassaux d'un seigneur se devaient à





lui de préférence au monarque ; et même au temps de saint Louis, ils étaient, en France et en certains cas, obligés par la loi de servir leurs seigneurs contre le roi. Mais en Italie, une diète convoquée par Frédéric Barberousse déclara que dans tout serment de fidélité d'un vassal à son seigneur, l'empereur serait excepté nominativement, c'est-à-dire, qu'au cas de collision entre le seigneur et le monarque, la fidélité serait due en premier lieu à celui-ci, et M. Allen affirme qu'il en fut de même au quinzième siècle en Angleterre. De là la distinction entre l'hommage lige ou serment de fidélité, d'où est venu le mot *alléiance*, lequel était dû au roi comme chef de l'état, et l'hommage simple qui n'était dû qu'au seigneur et auquel était joint quelque vasselage ou service.

D'autres coutumes naquirent de cette situation des choses. Lorsque des liens existaient qui impliquaient de la part du roi et de son sujet, ou de la part des sujets entre eux, une foi mutuelle, on ne pouvait les rompre sans un avertissement préalable qui s'appelait *diffidatio* ou défi. Ainsi, avant la déposition d'Édouard II., les lords lui envoyèrent un député qui lui déclara renoncer en leur nom à l'hommage qu'ils lui avaient prêté, et les mêmes formes furent observées lors de la déposition de Richard II.

Les Anglais cependant, pour déterminer le véritable sens de l'alléiance, eurent soin de distinguer la couronne de la personne du roi. La déclaration



du parlement de 1642 établit à cet égard des principes dignes d'être remarqués. Selon cette déclaration, la volonté personnelle du roi, ses ordres mêmes, ne peuvent prévaloir sur les devoirs des dépositaires de son autorité dans les actes qui se rattachent aux attributions de la couronne ; ainsi se trouva nettement posée la doctrine de la responsabilité des ministres. Le parlement de son côté a droit de contrôle sur les concessions faites par le roi lorsqu'elles peuvent préjudicier aux intérêts de l'état : comme pouvoir politique, il pourvoit aux nécessités du pays, à la paix publique et à la sûreté du royaume ; il manifeste en cela et il déclare le suprême plaisir du monarque, encore que celui-ci, séduit par de mauvais conseils, puisse personnellement avoir une volonté différente.

La capacité politique du roi est de la sorte pleinement séparée de sa capacité personnelle, et l'autorité de la couronne, considérée comme fiction politique, est entièrement attribuée aux deux chambres du parlement.

On sent que la restauration devait repousser de telles doctrines, mais une nouvelle révolution ne tarda pas à démontrer combien il est dangereux pour le monarque de s'en affranchir entièrement.

Le principe de la résistance au roi, lorsque par son mauvais gouvernement il met l'état en danger, continua d'être professé par les publicistes anglais. Blackstone n'en fit l'objet d'aucun doute, en ajoutant qu'il fallait laisser aux générations futures

le soin de déterminer les cas où la sûreté de tous imposerait la nécessité de recourir à l'exercice d'un droit qui appartenait à toute société, et qui subsisterait éternellement dans toute sa force.

Malgré les progrès de la théorie monarchique en Europe, il y avait des états chez lesquels cette résistance au roi était formellement consacrée par la loi. En Castille, en Aragon, les nobles jouissaient du *privilege de l'union*, qui consistait à s'associer contre la couronne, lorsque le roi attentait à leurs libertés ; cette union promulguait ses ordres sous un sceau commun, et pouvait faire la guerre au roi sans exposer ses membres aux peines de la trahison ou de la rébellion.

En Angleterre même, la grande charte du roi Jean confiait à vingt-cinq barons librement élus le devoir de veiller à ce que les libertés accordées par le monarque fussent respectées ; ces barons étaient armés d'un pouvoir suffisant pour contraindre le roi à accorder la satisfaction demandée. La seule restriction à ce droit d'hostilité servait à marquer encore plus la distinction entre la capacité politique du roi et sa capacité personnelle ; elle consistait dans la défense de ne toucher ni à la personne du roi, ni à celle de la reine et de leurs enfants. Mais cette garantie, dont le caractère de Jean avait suggéré l'idée, fut après lui jugée inutile ou dangereuse, et elle ne fut pas insérée dans la grande charte de son fils.

L'établissement du pouvoir judiciaire remonte

très-haut et subit avec le temps de notables modifications. C'est là encore qu'on retrouve la fiction politique inhérente à la royauté.

La maxime *Toute justice émane du roi* fait partie ou est une suite de cette fiction ; car en réalité le roi est inhabile à rendre la justice lui-même.

Il existait, bien avant qu'il y eût des rois, des cours de justice chez les anciens Germains, d'où sont descendus les Anglo-Saxons ; ces cours se composèrent dans chaque district d'un chef assisté de tous les hommes libres. Les offenses capitales étaient jugées par les assemblées de la nation, et ces tribunaux prononçaient en dernier ressort.

Après l'établissement de la royauté, le monarque devint président de l'assemblée de la nation ; mais lorsque le peuple fut dispersé sur un grand territoire, et que les hommes libres ne purent plus être convoqués en entier, les affaires furent portées devant un conseil présidé par le roi. Une hiérarchie de tribunaux fut établie, et on emprunta aux Romains l'appel à la cour du roi, des décisions des juridictions inférieures.

Le conseil que présidait le monarque formait la cour suprême de justice, il ratifiait les transactions civiles des citoyens, mais il n'était permis de s'adresser à lui qu'autant que la justice avait été refusée dans les tribunaux du comté auquel on appartenait. Le roi d'abord dirigeait lui-même les débats, ou il envoyait son sceau à quelque autre tribunal et lui déléguait le droit d'entendre et de décider l'affaire.



Après la conquête, les rois d'Angleterre perdirent peu à peu l'usage de siéger dans leurs cours de justice ; Henri II. et Henri III. s'y conformèrent bien encore ; on rapporte même qu'Edouard IV. siégea trois jours consécutifs dans le *King's Bench*, pour s'assurer si les lois étaient mises à exécution ; on ne dit pas s'il participa au jugement ; mais au commencement du dix-septième siècle, lorsque Jacques I<sup>er</sup> voulut siéger en personne, les juges lui dirent qu'il n'avait pas le droit d'émettre une opinion.

Si donc la maxime que tout justice émane du roi est maintenant reçue, c'est, on le répète, une pure fiction, car cet autre principe est devenu incontestable, que le roi peut bien assister à une cour de justice, mais qu'il ne peut personnellement décider aucune question ; il n'est habile à le faire que par l'intermédiaire des juges qu'il a investis de son autorité et qui tiennent leurs pouvoirs de lui.

C'est encore une fiction que le roi n'est justiciable d'aucun tribunal ; car dans la pratique on peut plaider contre lui sur quelque question de propriété que ce soit ; à la vérité, on dira que la justice qu'on obtient ainsi est une pure grace, mais comme elle est due, il n'y a aucun dommage pour le plaideur.

Il y avait donc dès les premiers temps une idée vague de l'existence d'un pouvoir légal et constitutionnel supérieur au roi : sous le point de vue judiciaire, c'était la justice elle-même ; sous le point



de vue politique, c'était la responsabilité des ministres : ces deux garanties complétaient la théorie du gouvernement anglais.

Le droit de poursuivre les crimes et les délits appartenait à la couronne et tout à la fois aux particuliers : à la couronne, parce que c'est le roi d'Angleterre qui est censé injurié dans la personne de ses sujets ; aux citoyens, parce que la demande en réparation d'une offense est un droit naturel dont nul ne peut être privé.

Mais il y avait cette différence, que si la personne mise en jugement sur les poursuites de l'offensé était acquittée, elle ne pouvait plus être poursuivie de nouveau sur le même fait, et c'est le cas auquel s'appliquait la maxime *non bis in idem*, tandis qu'un acquittement sur une accusation dirigée par la couronne n'affranchissait pas le prévenu d'être poursuivi de nouveau par l'offensé et d'être jugé une seconde fois.

Il y avait encore cette différence, que dans le cas d'une condamnation après poursuite intentée au nom de la couronne, le roi pouvait faire grace comme personne injuriée ; il ne le pouvait pas lorsque la déclaration de la culpabilité avait eu lieu sur la poursuite de l'offensé : celui-ci dans ce cas était autorisé à accorder un répit, et même un pardon pour la félonie dont il était l'objet ; à son tour, il ne le pouvait pas, si l'accusation avait été intentée par la couronne.

Les poursuites dirigées par les particuliers pour

offenses étaient nommées *appels* ; ce droit *d'appel* avait succédé au droit de vengeance que les anciennes coutumes germaines accordaient aux parents et aux amis de la personne offensée, et duquel étaient résultées les compositions pécuniaires. M. Allen fait connaître dans les plus grands détails les règles auxquelles l'exercice de ce droit était assujéti. Mais insensiblement de meilleures idées prévalurent, la jurisprudence criminelle suivit les progrès de la civilisation ; les compositions pécuniaires tombèrent en désuétude pour les crimes graves, et la condamnation du coupable devint la seule réparation qui satisfît la société. Depuis Alfred jusqu'au règne de Canut, on trouve un accroissement graduel dans le nombre des offenses pour lesquelles la compensation pécuniaire cessait d'être admissible.

La fiction que le roi représentait l'état une fois admise, les offenses qui troublaient la paix publique furent considérées comme lui étant personnelles, et les poursuites dans l'intérêt de tous furent dirigées en son nom. L'ancienne procédure par *appel*, c'est-à-dire sur des accusations particulières, ne subsista pas moins et devint le sujet d'une foule de statuts. Mais ces appels eux-mêmes finirent avec le temps par être convertis en action civile ou abrogés, et sous Édouard III. ce qui restait de cette ancienne procédure fut aboli par un acte du parlement. La poursuite fut donc entièrement dévolue à la couronne. Le droit de grace lui

appartint exclusivement aussi, d'après le même droit qu'avait tout individu de révoquer *l'appel* par lui porté pour une offense personnelle ; le roi représentant, comme nous l'avons dit, l'universalité des citoyens, et étant censé aux yeux de la loi la personne injuriée, il put, dans chaque crime qui affecta la société tout entière, annuler par sa grace l'accusation portée en son nom et remettre la peine prononcée par le tribunal.

Ainsi, la poursuite et la grace font maintenant l'attribut exclusif de la couronne.

Mais les Anglais se montrèrent excessivement jaloux dans l'abandon qu'ils firent à la couronne de ce droit de grace ; il se passa bien du temps avant que cette concession fût complète ; différentes lois sous Édouard III. et Richard II. limitèrent, au cas de félonie, et déclarèrent sans valeur les graces accordées pour homicide hors du parlement, à moins que l'homicide n'eût été commis pour sa propre défense ou par accident.

Ce fut une autre fiction que celle dont nous avons déjà parlé, qui fit considérer le roi comme le seigneur universel et le propriétaire de toutes les terres de son royaume.

Car en remontant très-haut, on ne voit pas que les Saxons, qui les premiers occupèrent l'Angleterre, eussent concédé à leur général le territoire conquis. Les Normands, lors de la conquête, se gardèrent bien de faire une semblable concession ; loin de là, lorsque deux siècles plus tard le comte



de Varennes fut sommé par les commissaires d'Édouard I<sup>er</sup> de produire ses titres de propriété sur les terres dont il avait hérité de ses ancêtres, il tira son épée et la présenta comme le seul titre qu'avaient eu ses pères, disant que Guillaume n'avait pas conquis pour lui seul.

M. Allen explique avec une rare sagacité comment les propriétés se distribuèrent en Europe à ces époques reculées. *recense*

Chez les anciens Germains, le territoire possédé par la tribu était considéré comme propriété de la communauté ; des portions de terres étaient assignées aux familles et aux individus pour être reprises après un certain temps, et distribuées à d'autres familles ; ces distributions étaient d'abord annuelles, elles l'étaient du moins au temps de César ; il est probable qu'à mesure que l'agriculture fit des progrès, les terres furent possédées plus long-temps, peut-être pendant la vie de celui qui les avait reçues. Au temps de Tacite les partages avaient encore lieu, mais on ne sait pas si les concessions étaient encore annales ; seulement on doit supposer qu'un certain droit patrimonial commença à se former sur le terrain où la famille avait construit son habitation. Les villages germains consistaient en maisons séparées les unes des autres. Selon toute apparence, ces maisons et leurs enclos constituèrent la première propriété permanente de ces peuples ; telle fut aussi l'origine de la propriété foncière chez les Anglo-Saxons.



Lors de l'invasion de l'empire romain, si beaucoup de vaincus furent réduits en esclavage et si quelques propriétés furent confisquées, en général les vainqueurs partagèrent les terres et même les meubles, les esclaves et les bestiaux avec les anciens propriétaires. Ainsi agirent les Bourguignons dans la Gaule, les Visigoths en Espagne et les Ostrogoths en Italie ; les Lombards seuls se bornèrent à exiger une part des produits ; et quant aux Francs, quoiqu'on ne sache rien de positif sur la manière dont ils distribuèrent les terres après la conquête de la Gaule, cependant il est hors de doute que les habitants des provinces romaines ne furent pas entièrement dépouillés.

Les terres, distribuées aux vainqueurs selon leur rang, étaient transmissibles, et s'appelaient *allodiales*. Celles qu'on ne distribuait pas, et qui restaient à la communauté, s'appelaient *terres du fisc* ou *domaine public*. Le gouvernement en disposait ; beaucoup furent données à l'église, ou envahies par elle ; d'autres étaient de temps en temps converties en terres allodiales, ou appliquées à l'entretien du gouvernement et de la cour ; d'autres enfin étaient données à charge de rente ou de services, et prirent le nom de *bénéficiaires* ; ces possessions étaient d'abord à vie, mais avec le temps elles devinrent héréditaires ; le roi en était le dispensateur, et on était censé les tenir de lui.

A l'exemple de la couronne, les grands propriétaires allodiaux concédèrent à leurs vassaux de

*reputé*

semblables bénéfices, qui avec le temps aussi se transformèrent en fiefs héréditaires, à charge de certaines redevances.

Il arriva même que les propriétaires allodiaux trouvant, dans ces temps d'anarchie et de guerres privées, de l'avantage à se placer sous la protection d'un seigneur, faisaient un abandon fictif de leurs biens au roi ou à quelque grand, capable de les protéger, et les recevaient d'eux aussitôt à titre de fiefs héréditaires ; ils se soumettaient à quelque rente ou service, en échange duquel le seigneur accordait sa protection.

Selon toute apparence, les propriétés furent distribuées de la même manière en Angleterre sous les Anglo-Saxons ; les unes furent concédées pour devenir *patrimoniales*, les autres demeurèrent *communes* et furent laissées à la disposition de l'état ; celles-ci étaient possédées par la communauté, ou concédées à des particuliers pour un certain temps, mais tant qu'elles étaient *communes*, elles ne pouvaient être aliénées à perpétuité, et elles revenaient à la communauté lorsque le temps de la concession était expiré.

Les possesseurs de terres *communes* étaient tenus à une foule de charges dont les concessionnaires de terres patrimoniales étaient affranchis ; ceux-ci n'étaient tenus qu'aux contributions publiques, dont nul n'était exempt.

C'étaient principalement des terres concédées à titre de patrimoniales que possédait la haute no-

blesse. Les rois anglo-saxons en possédaient de semblables qui étaient pour eux des propriétés privées ; elles ne retournaient pas à la couronne, et ils pouvaient en disposer comme l'aurait fait un sujet.

Les propriétés *communes* furent d'abord converties en *patrimoniales*, dans l'assemblée publique de la tribu ; mais quand la fiction qui faisait considérer le roi comme représentant de l'état eut été admise, cette conversion se fit par un acte du gouvernement. Insensiblement et par une suite de la même fiction, les terres *communes* furent censées la propriété du roi, et prirent le nom de *terres royales* ou de *la couronne*.

Plus tard encore, la distinction entre les terres possédées par le roi comme patrimoniales ou privées, et les propriétés publiques, c'est-à-dire d'origine communale, s'effaça entièrement. Ces deux sortes de propriétés furent confondues, et reçurent la même dénomination de *terres de la couronne* : possédées par le roi, il les transmettait également à ses successeurs ; quoiqu'il fût privé du droit de les donner par testament, il lui arriva souvent d'en disposer par actes entre-vifs, et même par lettres patentes, sans le consentement de son grand conseil ; mais les abus devinrent si grands, que le parlement fut souvent obligé d'intervenir, et qu'en définitive, un statut de la reine Anne rétablit les anciens principes à cet égard : les terres de la couronne furent restituées à l'état ; le roi conserva



seulement le droit d'acquérir des propriétés foncières, et d'en disposer par testament comme une personne privée.

Telle est, messieurs, l'analyse à grands traits du savant ouvrage dont j'ai l'honneur de vous rendre compte ; je n'ai pas besoin, pour la compléter, d'ajouter que le roi est en Angleterre, aux yeux de la loi, la source de tous les honneurs et de toutes les dignités ; cette prérogative, commune à tous les gouvernements qui ont un chef héréditaire, est l'un des caractères les plus distinctifs et les moins contestés de la monarchie.

Cet ouvrage, dont le prix est rehaussé par le jugement qu'en a porté le célèbre ex-chancelier d'Angleterre, M. Brougham, rectifie beaucoup d'erreurs que les publicistes avaient accréditées ; la plus saine critique dirige l'auteur dans ses recherches, c'est par elle qu'il éclaire constamment les temps obscurs auxquels remontent la plupart de nos institutions politiques. Si l'on peut regretter quelque chose, c'est qu'il n'ait pas donné plus de développement et d'extension à un sujet si digne d'en recevoir. L'ouvrage est tellement concis, resserré, que j'ai dû souvent emprunter les propres paroles de l'auteur pour vous le faire connaître, et qu'il a fallu à son jeune traducteur une grande sagacité et une étude aussi approfondie des institutions anglaises, pour le faire passer dans notre langue avec tant de succès.

Du reste, ce n'est pas en vue de tel ou tel sys-



tème qu'il a été écrit ; on ne saurait dire, après l'avoir lu, à quelle nuance d'opinion M. Allen appartient ; c'est l'intérêt de la vérité qui paraît l'avoir constamment guidé ; aussi ce livre est-il destiné à jeter désormais un grand jour sur la plupart des questions qui se rapportent à la constitution des états monarchiques et à la liberté des peuples.

La royauté constitutionnelle apparaît de toutes parts dans ce livre, comme un symbole d'ordre et de stabilité ; elle suit les mouvements de la civilisation, elle prépare, elle favorise ses progrès ; elle s'améliore aussi elle-même, à mesure que les lumières se répandent et que les nations s'instruisent. Comme institution, elle seule, entre toutes les autres, est durable ; elle peut se modifier, mais elle ne périt pas, ou si de folles entreprises la renversent un moment, elle reparaît bientôt avec plus d'éclat, après s'être épurée de ce qui gênait son action protectrice. Elle s'accommode ainsi aux mœurs, elle se plie aux exigences des temps et au caractère des peuples. Les libertés publiques n'ont pas de plus solide garantie, car elle s'appuie elle-même sur ces libertés, et elle ne s'affermirait qu'autant qu'elle les protège.

Cette lutte même qui a existé si long-temps, et qui dure encore entre le principe monarchique et les partisans d'une liberté indéfinie, témoigne de la bonté du principe ; car dans le combat, ce n'est pas lui qui succombe ; en pactisant avec les idées dont le temps a amené le triomphe, il cède sans

*signé*

s'affaiblir, il se modifie sans se détruire, et la liberté satisfaite, en le protégeant à son tour, lui donne, au contraire, une plus grande force et une nouvelle vie.

Enfin la royauté constitutionnelle est essentiellement perfectible, don qui n'est accordé au même degré à aucune autre forme de gouvernement.

Après avoir lu le livre de M. Allen, on se sent donc plus disposé à aimer cette royauté, à s'y attacher et à la défendre. Avec elle, on n'a à envier aucun des avantages de la république, car le gouvernement constitutionnel les réunit tous sans avoir à redouter ses orages, sans craindre l'instabilité qui s'attache aux résolutions toujours incertaines de la multitude.

Loin de concentrer dans de certaines classes, à l'instar des monarchies absolues et des états aristocratiques, le privilège du pouvoir et l'éclat des dignités, il assigne à chaque citoyen la valeur qui lui est propre, il enrichit la patrie des talents et des vertus de ses enfants, et en même temps qu'il les fait servir à l'avantage de tous, il en accroît ce patrimoine de gloire, la plus belle portion de la fortune publique.

Il tend ainsi à développer sans cesse les plus nobles facultés de l'homme, mais en les dirigeant vers un bien commun et en n'assignant à toutes les ambitions d'autre but, comme d'autres limites, que les intérêts de la cité.

La nécessité qu'on sent le mieux encore, c'est, à l'exemple des Anglais, d'environner l'autorité royale d'une grande majesté, d'en faire un objet conti-

nuel de vénération, je dirais presque de culte de la part des peuples ; de lui rapporter ainsi tout le bien qui s'opère, et de la considérer comme une sorte de providence qui, dans aucun cas, ne saurait manquer aux besoins, ni être insensible aux vœux de la nation.

Le principe de la responsabilité ministérielle, qui est la base la plus solide du gouvernement constitutionnel, sert merveilleusement à cet effet, en ce que, plaçant le monarque tout-à-fait en dehors du mouvement quotidien des affaires, il ne permet à aucun blâme, ni à aucun mécontentement d'arriver jusqu'à lui : principe conservateur, fécond et vivifiant, qui est la sauvegarde des rois et le gage le plus assuré de la stabilité des institutions.

Nous devons enfin à M. Allen d'avoir mieux connu, mieux apprécié une forme de gouvernement qui a jusqu'ici pour elle l'épreuve d'une irrécusable expérience. Nous lui devons d'être plus pénétrés de sa supériorité sur toutes les autres, et de mieux sentir combien le monarque en qui se personnifie l'honneur et la gloire de la patrie, a besoin de compter sur notre affection, sur nos respects et notre appui, pour accomplir dans l'intérêt de tous la noble tâche qui lui est assignée.

Cet ouvrage nous paraît donc mériter au plus haut degré le suffrage de l'Académie des sciences morales et politiques, comme il méritera, nous n'en doutons pas, celui de tous les amis sincères de leur pays et de la liberté des peuples.

INQUIRY  
INTO  
THE RISE AND GROWTH  
OF  
THE ROYAL PREROGATIVE.





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INQUIRY  
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TRANSCENDENT ATTRIBUTES OF THE KING.

TO unlearned persons desirous of understanding the constitution of England, the transcendent attributes ascribed to the king, in his high political capacity, must prove a grievous stumbling-block at the very commencement of their studies.

They may have heard that the law of England is founded in reason and wisdom. The first lesson they are taught will inform them, that the law of England attributes to the King absolute perfection<sup>1</sup>, absolute immortality<sup>2</sup>, and legal ubiquity<sup>3</sup>. They will be told, that the King of England is not only incapable of doing wrong, but of thinking wrong, that he cannot mean to do an improper thing, that in him there is no folly or weakness<sup>4</sup>. They will

<sup>1</sup> Blackstone, i. 246.    <sup>2</sup> Ib. i. 249.    <sup>3</sup> Ib. i. 270.    <sup>4</sup> Ib. i. 246.

be informed that he never dies<sup>1</sup>, that he is invisible as well as immortal<sup>2</sup>, and that in the eye of the law he is present at one and the same instant in every court of justice within his dominions<sup>3</sup>.

They may have been told, that the royal prerogative in England is limited: but, when they consult the sages of the law, they will be assured, that the legal authority of the King of England is absolute and irresistible, that he is the minister and substitute of the Deity; that all are under him, while he is under none but God<sup>4</sup>.

They may have read of oriental despotism, and pitied the lot of nations that have no property in the soil they tread, and hold at the will of a master the lands they are permitted to cultivate. What then must be their surprise, when, turning to their domestic oracles, they are informed, that in the contemplation of law, the whole soil of England belongs to the King, and, if a learned judge is to be trusted, that for certain purposes he may enter thereon at his pleasure<sup>5</sup>; that he is the universal lord and original proprietor of all the lands in his kingdom<sup>6</sup>; that in the law of England there is no proper alodium, or land not held mediately or immediately of the King; and that no subject can have more than the usufruct or beneficiary enjoyment of the land he occupies<sup>7</sup>!

If they have had the benefit of a liberal education, they may have been taught, that to obtain se-

<sup>1</sup> Blackstone, i. 249.

<sup>2</sup> Howell's State Trials, ii. 598.

<sup>3</sup> Blackstone, i. 270; iii. 23.

<sup>4</sup> Ib. i. 251.

<sup>5</sup> Ib. ii. 415.

<sup>6</sup> Tout fuit in luy et vient de luy al commencement. Y. B. 24 Edw. III. f. 65. b.

<sup>7</sup> Blackstone, ii. 51, 59, 60; iv. 418.

curity for persons and property, was the great end for which men submitted to the restraints of civil government; and they may have heard of the indispensable necessity of an independent magistracy for the due administration of justice: but, when they direct their inquiries to the laws and constitution of England, they will find it an established maxim in that country, that all jurisdiction emanates from the crown. They will be told, that the King is not only the chief but the sole magistrate of the nation, and that all others act by his commission and in subordination to him<sup>1</sup>.

Individuals, they know, are liable in every country to suffer from violence and oppression; but in England they will be assured, that though the actual sufferer be a private individual, the person injured in the eye of the law is the King, because he is the general conservator of the public peace; and from these premises, they will be told, arises the royal prerogative of pardoning offences, because it is reasonable that he who is injured should have the power to forgive<sup>2</sup>.

In addition to these transcendent attributes possessed by the King of England in his political capacity, they will find that he has the power of the sword; that the armed force of the nation is at his sole disposal; that the government and command of the militia, that all the forces by sea and land, that all castles and fortresses belong to him; and that an impassable barrier environs his dominions, of which he is the sole and undisputed lord<sup>3</sup>. They will also be told, that he is the fountain of honour

<sup>1</sup> Blackstone, i. 250, 266.    <sup>2</sup> Ib. i. 268, 269.    <sup>3</sup> Ib. i. 262-264.



and dignity ; that he represents the majesty of the whole community<sup>1</sup> ; that he is the delegate and representative of the kingdom with respect to foreign powers ; that his acts are the acts of the nation ; that he can make peace or war at his pleasure, and bind his subjects by the engagements he contracts and the treaties he ratifies<sup>2</sup>.

As some of these transcendent attributes are incompatible with our notions of a finite, corporeal, and mortal being, it may possibly occur to an inquisitive and reflecting student, that they belong to an ideal personage, who has no existence in nature, and is a mere fiction of the imagination.

King is a  
corporation  
sole ;

On further inquiry he will find this conjecture not entirely destitute of foundation. He will be told that the king is, and ever has been, a corporation sole<sup>3</sup> ; that a corporation is an artificial person that never dies<sup>4</sup> ; that is invisible, and exists only in intendment and consideration of law ; that has no soul, and cannot therefore be summoned before an ecclesiastical court or subjected to spiritual censure ; that can neither beat or be beaten in its body politic, nor commit treason or felony in its corporate capacity ; that can suffer no corporal punishment or corruption of blood, and can neither be imprisoned or outlawed, its existence being merely ideal<sup>5</sup>. So far he will be satisfied that the King of England, as described in law books, is in some sense an ideal personage.

It may be said, indeed, that the King is not more an ideal personage than a parson or other

<sup>1</sup> Blackstone, i. 271 ; iv. 2.

<sup>2</sup> Ib. i. 252, 257.

<sup>3</sup> Ib. i. 469, 472.

<sup>4</sup> Ib. i. 467, 468.

<sup>5</sup> Ib. i. 477.

corporation sole ; that it is merely the office, which is converted by a fiction of law into a person ; and that the object of this transmutation is to have the same identical rights kept on foot, and continued for ever by a succession of individuals, possessing the same privileges, and charged with the same duties. But, on reflection, it will appear that there is a wide difference between the King and other corporations sole. A parson, considered as a corporation, is an artificial and ideal personage as much as the King. But the rights a parson possesses, the qualities attributed to him, and the duties he has to perform in virtue of his office, are such as, in his personal capacity, he may sustain, exercise, and enjoy. The law, that converts him into a corporation, requires from him no impossibilities, and ascribes to him no attributes incompatible with his character as a limited and created being. He is bound to preach and pray, but he is not supposed, in the contemplation of law, to preach and pray at one and the same instant in every corner of his parish. He must be learned and orthodox, but he is not held to be perfect in learning or exempt from error in opinion. He must be moral in his conduct, and ought to be innocent in his thoughts ; but he is not esteemed incapable of doing or of thinking wrong. He has the same rights, and is reputed in law to be the same person with his predecessor, who lived centuries ago ; *quatenus* parson he never dies any more than the King. But it is not thought necessary for the continuance of his office, and the preservation of its rights and immunities, that one incumbent should follow another without interval

but different from other corporations sole.

or interruption. When he dies, time is given for the appointment of a successor, and though the office is vested in no one during that period, the corporation is not supposed to be thereby extinguished. But rule and government, as established in England, cannot exist *for a moment* without some one filling the office of King<sup>1</sup>.

Ideal theory  
of the Eng-  
lish mon-  
archy.

There is therefore something higher, more mysterious, and more remote from reality, in the conception which the law of England forms of the King, than enters into the notion of a corporation sole. The ideal King of the law represents the power and majesty of the whole community. His *fiat* makes laws<sup>2</sup>. His sentence condemns. His judgments give property, and take it away. He is the state<sup>3</sup>. It is true, that in the exercise of these powers, the real King, to whom they are necessarily entrusted, is advised, directed, and controlled by others. But in the contemplation of law the sovereignty and undivided power of the state are in the King.

It is not my intention to dispute the truth or reality of this view of the constitution of England. However hazardous it may appear to make the rule and government of a great nation depend on the

<sup>1</sup> Attorney-General's Speech in Hardy's Trial. Howell's State Trials, xxiv. 246.

<sup>2</sup> In an argument before the Court of King's Bench, in 23 Edw. III. it was said, "Que le roy fist les leis par assent dez peres et de la commune, et non pas lez peres et la commune." Y. B. 23 Edw. III. f. 3. b.

<sup>3</sup> ——"The person of the king, in name, is the state. He is to all intents and purposes the sole representative of the state." Solicitor-General's Speech in Hardy's Trial. Howell's State Trials, xxiv. 1183.



life and health of a single individual, subject to all the casualties and infirmities of human nature ; however extravagant it may seem to attribute to one member of the community, as chief and representative of the commonwealth, the entire power and authority of the whole ; there cannot be a doubt that such is the constitution of England, as laid down most strongly and emphatically in the works of lawyers, and in the homilies of churchmen<sup>1</sup>. Still less am I about to question or discuss the wisdom or expediency of this artificial system of policy in the ordinary acts and operations of government. Where it seems most liable to objection, it is qualified and corrected by other maxims and principles of constitutional law, that render it innoxious, or mitigate, at least, the dangerous consequences that seem at first sight necessarily to flow from it. The King, it is true, can do no wrong, and is not amenable to any earthly tribunal ; but, on the other hand, he can perform no one political act without an adviser, responsible for the same. He cannot be sued in a court of law ; but if any one has a demand against him in point of property, a petition or plea of right is due to the claimant, through which justice will be obtained with as much certainty and despatch as in actions between man and man<sup>2</sup>. He alone has the power of raising and regulating fleets and armies<sup>3</sup> ; but he cannot raise or keep a standing army within his kingdom in time of peace without consent of parliament<sup>4</sup>.

Corrections  
in practice.

By these and other checks the exorbitant prero-

<sup>1</sup> Blackstone, i. 251.

<sup>2</sup> Ib. i. 243. iii. 256.

<sup>3</sup> Ib. i. 262.

<sup>4</sup> 1 Gul. et Mar. Sess. ii. c. 2.



gative of the crown is kept in England within bounds. It is fortunate for us such restraints exist, and that on the whole they have been found effectual; for the absolute sovereignty and transcendent dominion of the King, as laid down by lawyers without restriction or limitation, leave the subject without protection against the crown, and convert government, which was intended for the general good, into a private patrimony for the benefit of the King and of his heirs. But though these doctrines are in practice harmless, the wonder is not the less how they were first invented, and through what means they found admission into the law of England, so justly celebrated for its regard to the property and liberties of the people. The subject, though curious, seems to me to have attracted less attention from those who have traced the progress of our constitution, than its importance as an historical question deserves.

### MONARCHICAL THEORY OF MODERN EUROPE.

It is in the first place to be observed that the fiction of an ideal King, to whom all the powers of sovereignty are confided, is not peculiar to England. It is to be found in all the monarchies of Europe, established on the subversion of the Roman empire. However different in other respects, all these governments agree in recognizing, as the fundamental principle of their constitution, that the sovereign power of the commonwealth resides in the King. It is in the next place a coincidence

not less remarkable, that, after laying down this principle in terms the most general and unqualified, they all agree in admitting certain constitutional checks and limitations on the exercise of the supreme and absolute authority with which he is vested. What the law appears to give, long-established usage is supposed, in the most arbitrary governments, to moderate and restrain. In theory the King of France, before the revolution, was held in law to be an absolute, but in practice to be a limited, monarch. His power was said to be supreme, but it was to be administered according to fundamental laws. He was the source of all authority civil and political, but he was to govern by the fixed courts and magistracies of his kingdom. His will was law, and, as such, was to be obeyed ; but in issuing his commands, he was bound to respect the honour and even the prejudices of his subjects. He was the judge of his people, but he could not exercise any judicial function in person. He was the sole proprietor of land in his kingdom, but he could deprive no man of his inheritance, unless by a judgment of law, over which he had no control. If he transgressed these rules, he ceased to be a King, and degenerated into a despot<sup>1</sup>.

This opposition between monarchy in theory and in practice is as ancient as the existence of regal government in modern Europe. We find it in the earliest records of the Barbarians after their establishment in the empire, and the collisions to which it has given rise between kings and their subjects form none of the least interesting portions of the

Antiquity  
of this  
theory.

<sup>1</sup> Esprit des Lois, ii. 1, 4 ; iii. 8, 10 ; vi. 5 ; viii. 6 ; xxvi. 15.

history of the middle ages. The farther back we carry our researches the stronger is the evidence we discover, that, however the monarchical theory may have been proclaimed in law books and magnified by churchmen, it was never reduced, strictly and completely, to practice ; nor was it ever recognized or quietly submitted to by the people as the government handed down to them by their ancestors. We meet with continual struggles between Kings and their subjects, in which both parties appeal to their rights in support of their pretensions. If the King claims the prerogative vested in him by law, the people oppose to him ancient usages and privileges that restrain its exercise. On some occasions the King has proved victorious. At other times his subjects have had the advantage. Every nation in its turn has been threatened with anarchy or subjected to despotism. Like the good and evil principles of the Persian magi, liberty and prerogative have been in perpetual conflict ; and though in this country, and latterly in France, the better principle has gained the ascendancy, arbitrary power has more frequently prevailed, and by force or artifice has extended its empire over the fairest portions of the continent. But in no country, where the forms of royalty have been retained, has the feud been ever completely extinguished.

• In the most limited monarchy the King is represented in law books as in theory an absolute sovereign. In countries, where the constitutional checks to his will are the least powerful, there are obstacles, more or less effective, to his caprices. But where a government presents such contradictions



between its theory and practice, it cannot have been founded originally on any uniform or systematic plan. The theory, which ascribes absolute power to the monarch, cannot have been derived from the same principles that oppose constitutional checks to his prerogative. Such a government is manifestly the result of two separate, independent forces, acting in different directions, and producing, as they alternately preponderate, an inclination, sometimes to liberty, at other times to despotism. Nor is it difficult to discover from what sources these impelling forces had their origin.

It is plain the monarchical theory cannot have been derived from the ancient Germans. In the most considerable of the Germanic tribes the form of government was republican. Some of them had a chief, whom the Romans designated with the appellation of King, but his authority was limited, and in the most distinguished of their tribes the name as well as the office of King was unknown (A). The supreme authority of the nation resided in the freemen of whom it was composed. From them every determination proceeded that affected the general interests of the community, or decided the life or death of any member of the commonwealth. The territory of the state was divided into districts, and in every district there was a chief, who presided in its assemblies, and, with the assistance of the other freemen, regulated its internal concerns, and in matters of inferior importance administered justice to its inhabitants. These chiefs met in council by themselves, and discussed, in private, affairs relating to the general welfare ; but

Not derived  
from the  
ancient  
Germans,



their resolutions had no authority till they had been confirmed and ratified by the general assembly of the tribe (B). When a national war was undertaken, one of the chiefs was selected to command the army ; but on the return of peace his rank and authority as general ceased, and he reverted to his former station. This form of government subsisted among the Saxons of the continent so late as the close of the seventh century, and probably continued in existence till their final conquest by Charlemagne (C). Long before that period, however, the tribes that quitted their native forests and established themselves in the empire, had converted the temporary general of their army into a permanent magistrate, with the title of King (D). But that the person decorated with this appellation was invested with the attributes ascribed to royalty in after times is utterly incredible. Freemen, with arms in their hands, accustomed to participate in the exercise of the sovereign power, were not likely, without cause, to divest themselves of that high prerogative, and transfer it totally and inalienably to their general. Chiefs, who had been recently his equals, might, in consideration of his military talents, and from regard to their common interest, acquiesce in his permanent superiority as commander of their united forces ; but it cannot be supposed that they would gratuitously and universally submit to him as their master. There are no written accounts, it is true, of the conditions stipulated by the German warriors with their general when they converted him into a King. But there is abundance of facts recorded by historians, which

show beyond a doubt, that, though he might occasionally abuse his power by acts of violence and injustice, the authority he possessed by law was far from being unlimited (E).

Widely different was the condition of the Provincials. Whatever were the artifices by which Augustus had disguised his usurpation of the sovereign power, they had been long since laid aside. Whatever had been the moderation he affected in the exercise of that authority, it had been long since discarded by his successors. The government of the Roman world had been for ages a pure, unmitigated despotism, in its worst and most odious colours. The prince possessed in theory, and exercised in practice, every power of the state. He was invested with the most ample and most absolute authority ever enjoyed by man. The legislative, judicial, and executive functions of government, were united in his person, and used according to his caprice. He was the sole magistrate of the commonwealth, the others being merely his delegates, and answerable only to him. The lives, liberties, and properties of his subjects were at his mercy. His word was law, his sentence without appeal, and the course of judiciary proceeding dependent on his will. He could impose what taxes he pleased, and levy them at his discretion. He had the right of peace and war, the sole and exclusive command of the army, the power to levy troops, to appoint and displace their officers, to regulate their discipline, and to reward or punish them without control. There was no authority in the state, civil or political, that was not derived

but from  
the Roman  
Provincials.

from him, and was not revocable at his pleasure. The only barrier against his vices was the power of the military, whose support or defection raised him to the purple or precipitated him from the throne. The Christian clergy had acquired a secular influence over their flocks, but they had not yet ventured to interfere with the civil power, or attempted to regulate and disturb the state. If they ever exercised control over the imperial despot, it was by their authority over his conscience, and by appeals to his piety or superstition. It was an ascendancy entirely spiritual, unconnected with temporal dominion.

*+ influence  
not on policy  
religion.*

In what  
manner  
introduced  
among the  
Barbarians.

From this contrast of imperial despotism with the free institutions and independent character of the Germanic tribes, it is impossible to mistake the origin of that monarchical theory, which soon began to rear its head in every country occupied by the Barbarians. Repugnant to the genius, and at variance with the usages and ideas of the Germans, it was a phantom borrowed from imperial Rome, and insinuated by its servile ministers into the legal forms and language of their conquerors. It was the doctrine of civilians that the Roman people had transferred to their emperor the whole power and authority of the state, in consequence of which he became the sole organ and representative of the commonwealth. Whatever he pleased to ordain, was law. Whatever he commanded, was to be obeyed. These maxims had been theoretically established and practically enforced for ages when the empire became a prey to the Barbarians. The conquerors, accustomed to different notions of go-



vernment, were not inclined to part with the liberty and freedom from restraint, which they had enjoyed in their native woods; but the new situation in which they were placed, their dispersion over a vast territory, amidst nations they had subdued and plundered, made it necessary, for their common safety, to strengthen the arm of government, and entrust to a few what had formerly been the property of the whole. In practice, they gave up as little as possible of their ancient independence, and when roused by a sense of real or imaginary wrong, they were ready at all times to assert with their swords the rights they had inherited from their ancestors. But, in the changes that became necessary in their written laws, in the instructions to public officers for the administration of their internal government, and in the legal forms required for the secure possession and transmission of property, to which they had formerly been strangers, they were compelled to have the aid of provincial churchmen and lawyers, the sole depositaries of the religion and learning of the times. These men, trained in the despotic maxims of the imperial law, transfused its doctrines and expressions into the judicial forms and historical monuments of their rulers; and thus it happened, that if the principles of imperial despotism did not regulate the governments, they found their way into the legal instruments and official language of the Barbarians (F). An imaginary King or prince was created, in whom, by a legal fiction, was invested all the power and majesty of imperial Rome (G). The same names were even affected. The Bar-



barian, who had recently exchanged his title of *heretoga* for that of King (H), was persuaded to style himself Basileus, in imitation of the eastern emperors, or to prefix the appellative Flavius to his name; his sons and cousins were called Clitones or illustrious; his servants became Palatine officers, and his crown an Imperial diadem.

Condition  
of the Pro-  
vincials  
under their  
new mas-  
ters.

Abject and degraded as the Provincials had become in the last ages of the empire, they were superior in knowledge and mental attainments to their conquerors, and speedily acquired an influence in the direction of their affairs. As a body they were placed on an inferior footing, the life of a Barbarian being estimated at twice the value of that of a Roman of the same condition; but individually they found admission into the courts and palaces of their new masters, and were elevated to the highest offices of the state, and received among the guests or companions of the King. Churchmen for several generations were taken almost exclusively from their ranks<sup>1</sup>; and as the Barbarians, on their conversion, transferred to the Christian clergy the veneration and deference they had entertained for their ancient priests, the class from which churchmen were selected could not fail to obtain consideration and respect. Bishops were employed in secular concerns, entrusted with embassies, invested with judiciary authority, and placed on a par with the chiefs and magistrates who directed the affairs of government. Though the empire was subverted, everything Roman was

<sup>1</sup> Fleury, Hist. Eccles. xiii. 27. Edition of 1721. Montesq. Espr. des Lois, lib. 30. ch. 12.

not destroyed. The distinctions of rank and condition in the great body of the provincials were maintained. The Roman proprietor was despoiled of part of his lands, but he was secured in the possession of the rest. The Roman law continued in force, as the personal law of the vanquished, in every part of the continent subjected to the dominion of the Barbarians. In many of the countries they subdued, it finally predominated over their original customs; and in all it entered largely into the collections and codes of law which they subsequently framed for their own use. The municipal institutions of Rome survived, in all or in most of her provinces, the destruction of her empire, and came at length to be amalgamated and indissolubly united with the inferior magistracies of her conquerors<sup>1</sup>. Is it then to be wondered at that the political maxims and principles of her government insinuated themselves into the states erected on her ruins, and tainted, if not the substance, the forms at least and language of their public law?

When the servile language of the empire was first addressed to their rulers, the rude and illiterate Germans must have disregarded and despised the unmeaning flattery of the abject herd they had subdued. They could hear with indifference their Kings invested with the plenitude of despotic authority, and proclaimed the representatives and sole depositaries of the national power. They looked, not to parchments and to legal forms, but to their valour and to the recollections of their

Progress of  
the mon-  
archical  
theory  
among the  
Barbarians.

<sup>1</sup> Savigny's History of the Roman Law in the Middle Ages, i. 274, 295-306, 387-433.

ancient freedom, for the preservation of their rights; and with the carelessness and improvidence of Barbarians, they tolerated and tacitly acquiesced in the exaltation of their rulers, so long as it was confined to words and empty declarations. When roused by long-continued and wide-spreading oppression, or provoked by taxes and impositions without their consent, they flew to arms, and punished with merciless severity the authors and instigators of these iniquities. But if the oppression was local and occasional, it excited no general sympathy in their minds. They were accustomed to inflict or endure violence and injustice; and whether these proceeded from governments or individuals, none but the actual sufferers complained or called for redress. We must not, therefore, judge from particular acts of power of the general spirit of their government; nor allow ourselves to be misled by the judicial forms and expressions it was suffered to employ. The Barbarian, who had justice done to him in the ancient tribunals of his nation, inquired not in whose name it was administered. If he obtained the lands he wanted, it was indifferent to him in what form they were granted. He received them from the public authorities of the state, and cared not whether, in the act of donation, they were described as gifts of the King or of the kingdom.

Imitations  
of the Im-  
perial Court  
by the  
Kings of  
the Barba-  
rians;

The Kings of the Barbarians were delighted with the titles and trappings of the empire, and indulged with childish vanity in the imitation of Roman forms and customs. Edwin, a petty King of the Northumbrians, had a standard-bearer to precede



him in his progresses through the kingdom, and was not content to go from one house to another without a Roman tufa carried in procession before him<sup>1</sup>. Leuvigild, the Visigoth, had a diadem fashioned for his use, and assumed with it the style and purple robes of the empire. The fierce Odoacer was flattered with the title of Patrician, which, at the request of the Roman senate, he obtained from Constantinople. Even the great Theoderic condescended to accept from the same quarter the rank of Consul and Patrician; and though his good sense rejected the appellation and emblems of the Imperial dignity, he established in his court at Ravenna all the titles, offices, and gradations of authority, that had dazzled the Provincials while subjects of the empire<sup>2</sup>. Clovis, in imitation of Theoderic, received from the Emperor Anastasius the empty honours of the Consulate; and after having been decorated with a purple mantle, he had the satisfaction to hear himself saluted Consul and Augustus by his subjects<sup>3</sup>. His sons obtained from Justinian the concession of all the rights of the empire in Gaul; a transaction from which the Abbé Dubos<sup>4</sup> has inferred that the Kings of France acquired a legal right to the absolute authority they afterwards possessed. It is possible that, in the eyes of the Provincials, the cession of Justinian gave a sort of legal sanction to the right of con-

<sup>1</sup> Bed. Hist. Eccl. ii. 16.

<sup>2</sup> Theoderic not only restored the state and household of the Emperors, but preserved entire their provincial government, and filled with Romans almost all the offices in those various departments.—Savigny, i. 320.

<sup>3</sup> Gregor. Tur. ii. 38.

<sup>4</sup> Hist. Crit. v. 10; vi. 1, 16.



quest. But the grant was nominal. Gaul had been long separated from the empire. At all events Justinian had no authority and could confer no dominion over the Franks.

When Charlemagne revived the western empire, he had too much sense to ape the manners of the Imperial Court in his intercourse with his Germanic subjects. In his dress he retained the ancient simplicity of his countrymen<sup>1</sup>; and in his public acts, with the title of Emperor, he continued to style himself King of the Franks. His feeble successors were not satisfied with this moderation. His grandson Charles wore the ornaments and introduced the ceremonial of the Byzantine Court; and disdaining the appellation of King, he insisted on being called Augustus, and Emperor over all the Kings of the West<sup>2</sup>. In imitation of this folly, under pretence of maintaining their independence, the petty kings and princes in England and Spain assumed and made ridiculous the Imperial titles they affected<sup>3</sup>.

but their  
real power  
continued  
limited.

But, amidst the honours and decorations with which royalty was clothed by its flatterers and admirers, the rough garment of the Barbarian was seen to peep from under the borrowed purple of the empire. The real King, to whom these imposing titles and high-sounding claims were attributed, remained, as before, the chief of a warlike and turbulent people, regardless and hardly conscious of this fictitious change in his condition. The ideal King of the churchmen and civilians was an abso-

<sup>1</sup> Eginhard.

<sup>2</sup> *Théorie des Lois Politiques de France*, viii. Preuves, 283.

<sup>3</sup> Ducange, Gloss. *voce* Imperator.

lute prince, in whom were centred the whole power and majesty of the state. The real King, limited in his authority by ancient usage, depended on his personal qualities for the degree of power he possessed ; (and when seduced by his imaginary dignity to extend the bounds of his prerogative, he had not unfrequently to pay, with his life or deposal, the penalty of his rashness and presumption. After a time, however, the language of adulation, repeated in every act and instrument of government, produced its effect. Men, accustomed to hear their prince described as the source and depositary of their laws, began to think there must have been some ground for the assertion. The real power of the King, as general in war and chief magistrate in peace, when seasonably enforced and skilfully improved, enabled him to prosecute on many occasions with success his encroachments on the ancient usages and privileges of the nation. Order was maintained and justice administered in his name ; and as respect for order and justice gained ground, his subjects, who considered themselves indebted for these blessings to his care, were often induced to acquiesce in pretensions and submit to usurpations, which had no other origin than a theory of government, founded on fiction, borrowed from a foreign law, and fortified by time, because it had been suffered to pass without contradiction by those who, rejecting its authority in practice, were hardly aware of its existence in words. (After many a struggle between liberty and prerogative, the result has been in England that the real power of the King has been limited and defined by constitutional

Gradual  
progress of  
royal au-  
thority.

law and usage, but that the old attributes are still ascribed to him in law books ; that an incongruous mixture of real and imaginary qualities has been formed, which has been called the union of his natural with his mystic or politic capacity ; and that many privileges and peculiarities have been assigned to him in his natural person, for reasons derived from his ideal or politic character.

In one respect the ideal King of the Barbarians was induced by his churchmen to make a higher pretension than had been ever claimed or asserted by the Roman Emperors. The latter, however tyrannical in their conduct, professed to derive their power by delegation from the people ; and in proof of that delegation, their lawyers referred to the celebrated Lex Regia, by which the Roman people were supposed to have conferred on their prince the whole power of the commonwealth<sup>1</sup>. But the ideal King of our ancestors, under the tuition of his clergy, was taught to derive his power from Heaven. Though raised to the station he held by the election of his people, the nomination of his predecessor, or the cabals of his partisans, the instant he attained that dignity, he was made to style himself King by the Grace of God<sup>2</sup>. In imitation

Divine origin attributed to monarchy.

<sup>1</sup> Quod principi placuit, legis habet vigorem ; utpote cum Lege Regia quæ de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat.—Pandect. l. 1. t. 4. See also Instit. Tit. 2. § 6 ; and Codex, l. 1. t. 17. § 7.

<sup>2</sup> Ancient Laws and Institutes: Preamble to Dooms of Ine ; and Codex Diplomaticus, *passim*. Selden's Works, iii. 128. Mabillon de Re diplom. l. 2. c. 3. The letter of Pope Gregory to Æthelbert, King of the Kentishmen, insinuates to that prince, in no ambiguous terms, that he had been set over his people by the special appointment of Providence. Beda, H. E. i. 32.



of the Jewish monarchs, he was anointed with oil and consecrated by a priest; and to impress a greater sanctity on his character, he was saluted as the Vicar of Christ over Christian people<sup>1</sup>. These pretensions, which have given rise to so much idle discussion in times comparatively modern, are as ancient as the Anglo-Saxon period of our history. Under the Normans and Plantagenets they were not abandoned. Henry I., notwithstanding the irregular steps by which he mounted the throne, styles himself King by the Grace of God<sup>2</sup>; and his grandson, one of the most imperious of our princes, in a controversy he maintained with the Bishop of Chichester concerning the immunities of Battle Abbey, had the hardihood, in the presence of his assembled nobles and clergy, to assert that his royal dignity was given to him by God<sup>3</sup>, though there were many present who must have known that he had obtained it by a convention with Stephen guaranteed by the great men of the kingdom.

But if Kings derive their power from Heaven, it was held there could be none on earth to control them, or call them to account. However ca-

<sup>1</sup> Laws of Æthelred, ix. 2, 42. In the acts of a synod or council held at Cealchythe in 785, the petty King of the Mercians is repeatedly called *christus Domini*; and texts are accumulated from Scripture, to show that his person is sacred and inviolable. Wilk. Conc. i. 148. In a Saxon homily quoted by Wheloc (Beda, 151) the King is styled Vicar of Christ, consecrated to be Shepherd of the Christian people whom Christ has redeemed, and Christ is said to have given him authority under himself.

<sup>2</sup> Charter to Archbishop William, and to the minister of Christ Church, Canterbury. Lye's Diction. App.

<sup>3</sup> Spelman, Conc. ii. 58.



precious or tyrannical their conduct, it was the duty of subjects to obey, or at least to oppose no active resistance to their commands. Rebellion was declared to be sacrilege ; and the persons guilty of so heinous a crime were excommunicated, and devoted to eternal perdition in company with the devil and his angels<sup>1</sup>. Texts from St. Paul, intended to inculcate obedience on Christian people under every species of government, were restricted by these commentators to the government of Kings ; and, what is almost incredible, the prophetic denunciations of Samuel against kingly government were adduced as proofs from Holy Writ, that Kings may lawfully do what they please, and that it is sinful to oppose their will<sup>2</sup>.

#### MONARCHICAL THEORY OF ENGLAND.

On this double basis has been erected in England, as in other parts of Europe, the theory of monarchical government. The King has been invested by law and religion with a character at once despotic and divine. His office has been deemed sacred as a delegation from Heaven, and the sacredness of his office has been communicated to his person. In law, his prerogative has been held to be the same with that claimed or possessed by the Roman Emperors. In practice, it is true, his power has been differently considered. There is no country in Europe where some limitation has not been opposed to the ideal despotism of the monarch. In

<sup>1</sup> Conc. Tolet. iv. 75.

<sup>2</sup> Mably, *Obs. sur l'Hist. de France*, l. 1, ch. 3.

England the checks are numerous and powerful ; but still, in theory, the authority of the King is held to be supreme. In the language of the greatest lawyers even of the present day, the whole power of the state is said to be vested in the King<sup>1</sup>. To reconcile practice and theory, without abandoning the fiction on which theory was founded, many evasions and subterfuges have been invented. The King is the supreme and sole legislator, say the lawyers ; but, according to the constitution of England, he can neither enact nor alter laws without the advice and consent of his Lords and Commons. He is lord of the soil ; but, by the law of England, he can dispossess no man of his inheritance, except by judgment of his peers. He is universal occupant ; but he “ cannot touch a blade of grass or “ take an ear of corn ” without leave of his Commons<sup>2</sup>. He is supreme in his judicial functions ; but, by long-continued usage, it is an established maxim of the constitution, that he must exercise them by his judges. He is supreme and absolute in the execution of the laws ; but he can perform no one act of executive magistracy without the assistance of others who are responsible for what they have done<sup>3</sup>. It is not, however, to these checks

<sup>1</sup> Attorney-General's speech in Hardy's Trial. Howell's State Trials, xxiv. 243. When Louis XIV. in the pride of despotism exclaimed, “ *L'état ! c'est moi,*,” he claimed no more than Mr. Attorney ascribes to the King of England.

<sup>2</sup> Bacon's Abr. Prerogative, b. 1.

<sup>3</sup> The monarchical theory of the English government, with some of its most important practical corrections, is thus laid down by one of the most eminent lawyers of the present day :—  
“ The power of the King, in name, is the state itself. All the

and limitations of the royal prerogative that I wish at present to direct the attention of my readers. My object is to show in what manner the reasonings of lawyers and established maxims of constitutional law, with respect to the real King, have been warped and perverted by considerations drawn from his ideal prerogative. For this purpose it will be necessary to go back to the more ancient authorities, as modern lawyers, while they repeat the expressions and adopt the conclusions of their predecessors, bring less distinctly into view the original theory on which they were founded.

Two bodies  
or capacities  
in the  
King of  
England.

The student, who consults our early authorities on constitutional law, will be told, that the King of England has in him two bodies or capacities; that he has a natural body, and a politic or mystical body; that his natural body is subject to the casualties and infirmities of other men, but that his body politic is utterly exempt from weakness or passion, secure alike from the helplessness of infancy and from the imbecility of age: that these two bodies, thus differently constituted, exist not apart, but are incorporated in one person, making one body, and not two bodies—corpus incorporatum in corpore

“ powers of the state, legislative and executive, are nominally in him. Not really, because the King can make no law but by the advice and with the assent of the Lords and Commons in parliament. He can execute no law but by his judges and other ministers of justice, according to a formed and regular establishment. He really does nothing, but he nominally does everything. The consequence is, that he is, to all intents and purposes, the state; and in his name every act is done.”—Solicitor-General’s Speech in Hardy’s Trial. Howell’s State Trials, xxiv. 1183.



naturali, et corpus naturale in corpore corporato<sup>SE</sup> in such a manner that the politic body includes in it the natural body, and the natural body has in it the politic body. He will be further told, that, when the King dies, his politic body escapes from his natural body, and, by a sort of legal metempsychosis, enters into the natural body of his successor; but, while he is alive, that the two bodies are indissolubly united and consolidated in one, the whole possessing the properties, qualities, and degrees of the politic body, which is the greater and more worthy, and, as such, draws to itself the other, and communicates to it its own virtues and endowments; and he will be assured it is for this reason that acts done by the King in his politic capacity cannot be set aside or impaired for defects or disabilities in his natural body. It will be afterwards explained to him, that if the natural body of the King is thus magnified by its conjunction with his politic body, it communicates to the latter in return qualities and powers which, as an impassible body it could not otherwise have enjoyed. It is, for instance, by means of his natural body that the King is enabled to have children to inherit his kingdom; for, as we are told by Lord Chief Justice Dyer, to engender issue is the office of his natural and not of his politic body<sup>1</sup>.

From this mystical union of the ideal with the real King, the inquirer after constitutional information will be led, through childish reasonings and

<sup>1</sup> Howell's State Trials, ii. 624. Calvin's Case. Plowden, 213. 217. 234, &c.; cases of the Duchy of Lancaster, and of Wyllion v. Barkly.



unintelligible jargon, to practical consequences that are obviously founded on expediency ; he will be conducted to other conclusions, that have neither reason nor convenience to plead in their favour ; he will meet with vain attempts to reconcile impossibilities, and unnecessary arguments to prove what no man in his senses ever questioned or denied ; he will find, in the same author, contradictory assertions on the self-same points ; and before his inquiries are brought to a close, he may possibly be led to the conclusion, that many of the prerogatives of the real King have been surreptitiously introduced and established under the colours of his ideal prototype.

Influence of  
his natural  
on his  
politic  
capacity :

in making  
the crown  
hereditary ;

in protect-  
ing his  
Queen and  
eldest son  
from trea-  
son.

He may have imagined that it was in order to prevent the mischiefs of an elective monarchy that royalty was made hereditary in England. But when he turns to his learned instructors, he will be told, that it is in consequence of the King's natural body having an operation on his politic body, that the crown goes by descent, and not by succession, as in other corporations<sup>1</sup>.

He may have heard that the life of the Queen, and the life of the King's eldest son, are protected by the statute of treason ; and he may have fancied it was from respect for the King and regard to the succession, that this protection was extended to them. But when he looks more deeply into the matter, he will find that it arises from the " mutual aid and reciprocal intercourse, influence, and communication of qualities " between the King's natural body and his body politic. His politic

<sup>1</sup> Howell's State Trials, ii. 598.

body gives dignity to his natural body. His natural body enables him to have a wife and child; and from the dignity it has acquired by its incorporation with his politic body, it confers on them the same protection from treason which he enjoys himself, though the body politic be entirely in him and no part of it in them. That the protection given by the statute of treason to the Queen and eldest son of the King is effected by an operation of law proceeding from the dignity of the natural person of the King, no one can doubt, "for you shall never find," says Sir Edward Coke, "that any other corporation whatsoever, of a bishop or master of a college, or mayor of London, worketh any thing in law upon the wife or son of the bishop or the mayor<sup>1</sup>." It would be idle to ask how it happens that the dignity of the King's natural body stops short at his eldest son, and extends not to his other children; or why a protection by statute was necessary, if the object was already accomplished by an operation of law.

If in these instances there is a communication of qualities from the real to the ideal personage, we shall find, in other cases, the attributes of the ideal King transferred with a liberal hand to his visible representative.

When we say that the King is always present in his courts of law, this must be understood of his ideal and not of his actual presence, as it is impossible for the real King to be in two places at once. But when we are told that, in consequence of this legal ubiquity, the King can never be nonsuit, for

Influence of his politic on his natural capacity.

King cannot be nonsuit, nor appear in a court of law by attorney.

<sup>1</sup> Howell's State Trials, ii. 598.

nonsuit is a desertion of the suit or action by the non-appearance of the party in court ; and that he can never appear in court by his attorney, for in the contemplation of law he is always present ; it is plain that we pass from his ideal to his real existence, and invest him with qualities in his real person that belong to him only in his ideal character. It is because the ideal King is held to be always present in his courts of justice, that the law has determined the real King can never be nonsuit, nor appear by attorney<sup>1</sup>.

There can  
be no laches  
in the King.

When we are told it is a standing maxim of English law, that in the King there can be no negligence or *laches*, and therefore no delay will bar his rights, because in the intendment of law he is always busied for the public good, and has not leisure to assert his rights within the times limited to his subjects<sup>2</sup>, it is clear that in the premises we consider the ideal King, who is supposed to be always occupied for the public good, and from this hypothesis draw a conclusion which we apply to the real King, who may be employed, without a thought of the public, in his own private pleasures and amusements.

King cannot be an  
infant, lunatic,  
or traitor.

As the ideal King is all-perfect, free from stain or blemish, and equally competent at all times to discharge his royal functions, it is held that the real King, though an infant, is of full age ; though a lunatic, in his senses ; and though an adjudged traitor, it has been decided that his assumption of the crown purges him at once from all attainders<sup>3</sup>.

<sup>1</sup> Blackstone, i. 270.

<sup>2</sup> *Ib.* i. 247.

<sup>3</sup> *Ib.* i. 247.



We are gravely told by lawyers<sup>1</sup>, that the King as King cannot be a minor, because "the politic rules of government have thought it necessary that he, who is to govern and manage the whole kingdom, should never be considered as a person incapable of governing himself." That is to say, because the law has attributed to the ideal King the entire management and government of the realm, it considers the real King, though a babe in swaddling-clothes, to be a person of years and discretion. How much more sensibly has another author of the name of Bacon<sup>2</sup> considered the question! "There is no infancy," he observes, "in the crown, though in the person; because the wisdom of the crown is not intended to rest in one person, but in the counsels of many, who are equally wise, whether the person of the King be old or young."

Reasons why the King can not be a minor.

The ideal King is the fountain of justice, and therefore no court can have jurisdiction over him. From this principle it is deduced as a consequence, that no suit or action can be brought against the real King, and that his person must be sacred, because there can be no tribunal that has a power to try him<sup>3</sup>.

No action can be raised against the King.

It is held that the King can do no wrong, for two reasons: first, because his prerogative was created for the benefit of his people, and cannot therefore be exerted to their prejudice<sup>4</sup>; and, secondly, because, if such a case occurred, the law

King can do no wrong.

<sup>1</sup> Bacon's Abridg. Prærogative A.

<sup>2</sup> N. Bacon, Discourses on the Law and Government of England.

<sup>3</sup> Blackstone, i. 242.

<sup>4</sup> Ib. i. 246; iii. 255.



would be incapable of furnishing any adequate remedy, and it would be weakness and absurdity to admit of any possible wrong without the possibility of redress<sup>1</sup>. On this species of logic it may be remarked, that to say there can be no wrong because there is no redress for it, is as reasonable as to maintain there can be no disease for which a physician has not a cure; and to argue that the prerogative cannot be exerted to the prejudice of the subject, because it was created for his benefit, is much the same as to assert, that an army, which had been raised in defence of the liberties of a country, cannot be employed for their destruction. But whence arises the impossibility of redress for wrongs done by the King? Because, in the contemplation of law, the King is sovereign and supreme.

King never  
dies.

The ideal King is immortal in law; but as it is impossible to extend that privilege to his visible representative, the lawyers have been compelled to devise an expression, which should obscurely and circuitously convey in words a fact, the possibility of which the law is very *tender* of acknowledging<sup>2</sup>. When the real King dies, they term it his demise, “an expression,” says Blackstone, “which signifies merely a transfer of property; for, as Plowden has observed, when we say the demise of the crown, we mean only, that in consequence of the disunion of the King’s natural body from his body politic, the kingdom is transferred or demised to his successor.” Sir Edward Coke<sup>3</sup> is

<sup>1</sup> Blackstone, i. 244.

<sup>2</sup> Ib. i. 249.

<sup>3</sup> Howell’s State Trials, ii. 624.

so cautious of admitting the King's natural mortality, in opposition to the plain language and positive asseverations of the law, that he thinks it necessary to establish the truth of the fact by the dangerous consequences that would result from denying it. "The King *in genere*," says that learned judge, "dieth not ; but, no question, *in individuo*, he dieth ; as for example, King Henry " VIII., Edward VI., and Queen Elizabeth ; for, " otherwise, you should have many Kings at once." And then he tells a story of one Constable, a sturdy disputant, who was attainted and executed in the time of Philip and Mary, for maintaining that King Edward VI. was still alive.

But, if the law is unable to confer real immortality on the King in his proper person, it considers him in all legal consequences as actually possessed of that privilege. Land given to a man for ever, without any mention of heirs, vests in him only an estate for life. But if the same grant, in the same words, is made to the King, it creates an estate of perpetual inheritance, because in judgment of law the King never dies <sup>1</sup>.

Legal consequence of this principle.

The gift of immortality is not the only instance where the ideal King has not been able to convey entire to the real King the attributes he enjoys in his ideal capacity ; and from reluctance on the one hand to abate one jot of the prerogative of the ideal King, and difficulty on the other hand to maintain their actual existence in the person of the real King, lawyers of the first eminence have been reduced to the necessity of contradicting themselves in differ-

<sup>1</sup> Blackstone, ii. 107. 109.

Sovereignty  
of the King.

ent parts of the same work. Thus, for instance, we are taught by Blackstone, that “the law ascribes “to the King sovereignty or pre-eminence<sup>1</sup>,” though we had been previously told, that “the legislative and, of course, the supreme and absolute “authority of the state is vested in parliament<sup>2</sup>.” That is to say, in legal theory the ideal King is supreme; but in practice “the power of parliament “is absolute and without control. It hath sovereign and uncontrollable authority in the making, “confirming, enlarging, restraining, abrogating, “repealing, reviving, and expounding of laws, concerning matters of all possible denomination, ecclesiastical or temporal, civil, military or criminal; “this being the place where that absolute, despotic “power, which must in all governments reside “somewhere, is entrusted by the constitution of “these kingdoms<sup>3</sup>.”

But, if the power of parliament be “absolute “and despotic,” if its authority be “sovereign and “uncontrollable,” it is manifest that “sovereignty “and pre-eminence” cannot be attributed to the King in the same sense; and therefore Blackstone either contradicts himself in these passages, or, when he ascribes sovereignty without qualification to the King, he speaks of the ideal King, who is supposed by a legal fiction to represent and possess the whole power and authority of the state, and not of the real King, who cannot pass a turnpike act without the advice and consent of his Lords and Commons. The ideal King of the lawyers is a

<sup>1</sup> Blackstone, i. 241.

<sup>2</sup> Ib. i. 147.

<sup>3</sup> Ib. i. 160. 162.



King above law ; the real King of the constitution is a King subject to law.

The same confusion of language and apparent contradiction of thought are to be found in our earliest writers on constitutional law, and arise from the same inattention to the two different senses in which the word King is employed. When Bracton and the author of Fleta<sup>1</sup> describe the King as the vicar of God and substitute of Christ upon earth, and declare that all are under him, while he is under none but God, they speak of the ideal King, the imaginary representative of the whole community. When they tell us that the King has a superior in the law, which made him King, and in his great council, composed of his earls and barons, they speak of the real King of England, who has no authority but what is given him by law, and no power to change the law without the consent of his great council or parliament<sup>2</sup>.

Perfection is another attribute of royalty, which the lawyers have found a difficulty in transferring from their own fictitious creation to the real King of the constitution. "The law," says Blackstone<sup>3</sup>, "ascribes to the King, in his high *political* capacity, "absolute perfection." But, "notwithstanding this " *personal* perfection, which the law attributes to "the sovereign, the constitution has allowed a "latitude of supposing the contrary, in respect to

Perfection  
of the King.

<sup>1</sup> Bracton, l. 1. c. 8, f. 5, 6. Fleta, l. 1. c. 5. § 34. Omnia quidem sub eo, et ipse sub nullo, nisi tantum sub Deo.

<sup>2</sup> Bracton, l. 2. c. 16. § 3. f. 34. Fleta, l. 1. c. 5. § 4. In populo regendo, says the last, superiores habet (rex), ut legem, per quam factus est rex, et curiam suam, videlicet, comites et barones.

<sup>3</sup> i. 246, 247.



“both houses of parliament,” by giving to them “the right of remonstrating and complaining to the King even of those acts of royalty which are most properly and personally his own; such as messages signed by himself and speeches delivered from the throne.” Here, we have *personal* perfection given to the real King, because *political* perfection is attributed to the ideal King; and then, we have this personal perfection qualified and curtailed by the undoubted right of the two houses of parliament to remonstrate against acts that are most properly and personally his own.

#### TARDY GROWTH OF MANY OF THE ROYAL PREROGATIVES.

The difference that still subsists on these particulars between the monarchical theory of lawyers and the real constitution of England, extended in former times to many more branches of the prerogative, and to some even of the highest and most sacred attributes of royalty.

The immeasurable distance at which the King is placed by law above the other members of the community was unknown in the infancy of the constitution. Our Saxon ancestors distinguished the different classes of society by the difference of their *weregild*, or of the legal composition for their lives, and by the difference of their *mundbreach*, or of the legal penalty for the violation of their *mund* or protection. The Kentish law also exacted different penalties for theft, according to the rank and dignity of the person from whom the stolen property

Weregild  
and mund-  
breach of  
the Anglo-  
Saxon  
kings.

had been abstracted. If we compare in these particulars the protection given by law to the King with the protection it afforded to the other members of society, we shall find that, though in most cases he is highest on the list, the difference between him and those next him in authority is not such as to mark a greater disparity between them than what existed between different classes of his subjects.

The Kentish law was so favourable to ecclesiastical authority, as in the case of theft to exalt the church above the King. If any one stole from a church, he had to pay twelve times the value of what he had stolen. If he stole from a bishop, he had to pay eleven times the value; if he stole from the king or from a priest in full orders, nine times; and if he stole from an ordinary freeman, three times. These rates were established by the first Christian King in Kent, and some of them are repeated in a constitution made by the King and his *witan* four hundred years afterwards<sup>1</sup>.

If any one violated the public peace in a *burh* or town belonging to the King or bishop, he had to pay 120s. If the offence was committed in the burh of an ealdorman, the penalty was 80s.; and if it took place in the burh of a King's thegn, the mulct was only 60s.<sup>2</sup>. These rates are stated somewhat differently in the laws of Alfred, but whether from variations in local usage, or from a change in

<sup>1</sup> LL. Æthelb. l. 4. 9. LL. Æthelredi, vii. 7, where, though referring to the Kentish Laws, it is said that the *archbishop's* property is to be thus compensated.—ED.

<sup>2</sup> LL. Inæ, 45. The *burh* was a town or village with the district included in its jurisdiction.

the law, is uncertain. According to Alfred<sup>1</sup>, the penalty for breach of the peace in a King's burh was the same as in the time of Ine, that is, 120s. ; but for the same offence in the burh of an archbishop it was only 90s. ; in the burh of an ordinary bishop or of an ealdorman, only 60s. ; and in that of a thegn or twelfhynd man, only 30s. For the same offence in the burh of a sixhynd man the penalty was 15s. ; and if committed in the close of a ceorl or twyhynd man, it was 5s.

In Kent the *mundbreach* of the archbishop was as high as that of the King ; among the Saxons and Angles it was lower. By the West Saxon law 5*l.* of good pennies were due for breach of the King's mund ; 3*l.* for breach of the archbishop's ; and 2*l.* for the *mundbreach* of an ordinary bishop or of an ealdorman<sup>2</sup>. Among the Angles the rates were the same, with this addition, that the penalty for violating the mund of an ætheling, or prince of the blood, was the same as for the archbishop<sup>3</sup>. These valuations were repeated and confirmed by Canute<sup>4</sup>. They place the King above his subjects, but indicate no such disparity between them as existed in after-times.

The slight degree in which the King was elevated above the higher classes of his subjects appears still more remarkably in the laws of weregild. The Anglo-Saxons had a regular weregild or legal com-

<sup>1</sup> LL. Ælfredi, 40. The thegn was called a twelfhynd man, because his weregild was 1200s. The weregild of the sixhynd man was 600s. ; and that of the ceorl or twyhynd man, 200s.

<sup>2</sup> LL. Ælfredi, 3. LL. Æthelr. vii. 6.

<sup>3</sup> LL. Æthelr. vii. 12.

<sup>4</sup> LL. Cnut, Eccl. 3.



position for the King as for the meanest freeman in his dominions. By the Mercian law the composition for a ceorl or freeman of the lowest class was 200*s.* or 800 Saxon pennies. The weregild of a thegn was six times that of a ceorl, that is, 1200*s.* or 4800 pennies. The simple weregild of the King was six times that of a thegn, or 120*l.*, that is to say, 7200*s.* or 28,800 pennies; but, for the King as much more was due to the state, making the whole 240*l.* The simple weregild of the King went to his family; the *cynebót*, or composition to the state, went to his people<sup>1</sup>.

Among the North Angles, or, according to another reading, the Middle Angles, the gradations from the ceorl were different, and the weregilds of the higher classes of society proportionally greater. The weregild of the ceorl was the same as among the Mercians; it was reckoned at 266 *thrymsas*, which are expressly stated to have been equal to 200 Mercian shillings, or 800 pennies<sup>2</sup>. The weregild of a thegn, whether secular or clerical, was 2000 *thrymsas*, or 6000 pennies; that of a *hold* or high *gerefa* was 4000 *thrymsas*, or 12,000 pennies;

<sup>1</sup> Anc. LL. and Inst. pp. 79, 80. It is clear from page 80, that a Mercian shilling contained only four pennies; for we are there told, that six times 1200*s.*, that is, 7200*s.*, make 120*l.* But a Saxon pound contained, as our pound does at present, 240 pennies; and, therefore, 120*l.* contained 28,800 pennies, which, divided by 1200, leave 4 pennies for a shilling. The Conqueror calls a shilling of four pennies, *sol Engleis*.—(Leg. Will. Conq. 11.)

<sup>2</sup> Whatever may have been the *thryms* or *tremissis* on the continent, there can be no doubt from this passage that in England it was only three pennies; for, we are expressly told, that 266 *thrymsas* made 200 Mercian shillings.



that of a bishop or ealdorman 8000 thrymsas, or 24,000 pennies ; and that of an ætheling (I) or junior member of the royal family, 15,000 thrymsas, or 45,000 pennies. The King's simple weregild, due to his family, was the same with that of an ætheling ; but as much more was due to the state and paid to the people. The whole composition for the King was, therefore, 30,000 thrymsas, or 90,000 pennies, which make 375 pounds of silver, or 1181*l.* 5*s.* sterling.

In the West Saxon laws references are made to the King's weregild<sup>1</sup>, but the amount of it is not given. One instance is mentioned in the Saxon Chronicle, where payment for a West Saxon prince, who had mounted the Kentish throne, was exacted from the people of Kent, who had risen against him and put him to death ; and on another occasion we are told by Beda, that, as the price of peace, legal compensation was made by the Mercians to the Northumbrians, for a brother of the Northumbrian king, himself a petty king, who had been slain in battle<sup>2</sup>.

From the whole tenor of the Anglo-Saxon laws it is clear that when the weregild for homicide, and the other penalties for violations of the public peace were discharged, the culprit had no further punishment to apprehend.

No maxim of English law has for ages been better established than that the person of the King is sacred, and that even to compass or imagine his death is treason. It appears, however, from these

<sup>1</sup> I.L. Ælfredi, 4.

<sup>2</sup> Sax. Chron. in 694. Bed. Hist. Eccl. l. iv. c. 21 (K).

legal and historical details, that in early times he had no other security for his life than what the law afforded to the meanest of his subjects. He had the protection of his weregild, and nothing more.

There is reason, indeed, to believe that it was not in his capacity of King, but in his character of *hlaford* or lord, that the person of the King became inviolable. Among our ancestors no connexion was more honourable, no tie more sacred, than the voluntary engagement of a man with his *hlaford*. It might be dissolved by mutual consent, or by infraction of the original agreement on either side. But, while it lasted, the *hlaford* was bound to fulfil the conditions he had entered into with his man ; and the man, on the other hand, was pledged to be faithful and true to his *hlaford* ; to love all that he loved ; to shun all that he shunned ; and neither wittingly nor willingly, by word or deed, to do aught displeasing to him. Such being the obligations which a man contracted with his *hlaford*, no crime appeared more heinous than a treasonable breach of that engagement. It is accordingly declared in one of the ancient laws collected by Alfred, and published in his name<sup>1</sup>, that if a man compasses the death of his *hlaford*, it is an offence for which no pecuniary composition can be admitted. The same protection is extended to the King. The crime is in both cases described in the same words, and designated by the same appellation, which, translated literally, may be rendered *hlaford* treason, or treason against one's *hlaford*. This provision is frequently repeated in the Anglo-

Origin of the sacredness of character attributed to the King.

<sup>1</sup> LL. Ælfredi, 4.

Saxon laws ; but no distinction is ever made between treason against the King and treason against other hlaforðs<sup>1</sup>. There was a difference, indeed, and one of material importance, with regard to the extent of the security afforded by the law. The King was considered as the hlaforð of the nation<sup>2</sup> ; and in consequence of that supposition, the security given to inferior hlaforðs against their particular retainers was in his case extended to all his subjects. In other respects, the law was the same for both, and continued so for many ages. But in process of time, as the crown rose in dignity and power, a distinction was introduced between treason against the King and treason against hlaforðs who were in the degree of subjects. The one was called high treason ; the other, petty treason. The distinction still subsists in the law of England ; but it is only from the ancient law of treason, where no such distinction was known, that the phrase of petty treason becomes intelligible (L).

Another distinction was subsequently made in favour of the crown. In the Saxon law it is the traitorous intention which constitutes the crime. " If any one," says Alfred, " plots against the life " of his hlaforð, he shall forfeit to the hlaforð " his life and all he has, unless he can prove his " innocence by the hlaforð's weregild." From this

<sup>1</sup> LL. Æthelst. i. 4. Æthelr. v. 30 ; vi. 37. Edg. ii. 7. Cn. Sec. 26. 58. 65. The Anglo-Saxon words for hlaforð-treason were hlaforð-searu, and hlaforð-swice.

<sup>2</sup> He is often called *cyne hlaforð*. Anc. LL. and Inst. pp. 79, 80. LL. Æthelr. v. 35 ; vi. 1 ; ix. 44. Sax. Chron. in 1051. Hickes' Diss. Ep. 51, from *cyn*, nation ; and sometimes *gecynde hlaforð*. Chron. Sax. in 1014 ; a word from the same root.



principle came the rule of law—*voluntas reputatur pro facto*—which, according to some lawyers of the greatest eminence, was the general law of England in homicide. It is with diffidence I venture to question an opinion held by Sir Edward Coke and Sir Michael Foster<sup>1</sup>; but, to my apprehension, the text quoted from Bracton<sup>2</sup> by Sir Edward Coke has no relation to this particular point; and the cases he refers to, where it had been adjudged that an attempt to commit murder was a capital offence, though the felonious purpose had not been accomplished, are cases, not of ordinary homicide, but of petty treason. I am therefore inclined to believe, that it was only in treason where the accused was held to be guilty of the crime laid to his charge—*licet id quod in voluntate habuerit non perduxerit ad effectum*<sup>3</sup>. But, whether this rule obtained in ordinary homicide or was confined to treason, certain it is, that, by the statute of Edw. III.<sup>4</sup>, it was abolished in petty treason, while it was retained in high treason. That celebrated statute makes it treason to compass or imagine the death of the King or Queen, or that of his eldest son and heir; but, where a servant plots against the life of his master, or a wife against a husband, or a clergyman against his diocesan, it requires, to constitute the crime of treason, that not only the intent should be proved, but the purpose carried into effect.

The crown of England has been for ages here-

<sup>1</sup> 3 Inst. 5. Foster, Crown Law, 193.

<sup>2</sup> Bracton, l. 3. tr. 2. c. 17. f. 136 b. (M.)

<sup>3</sup> Ib. l. 3. tr. 2. c. 3. § 1. f. 118 b.

<sup>4</sup> 25 Edw. III. st. 5. c. 2.



Crown  
elective in  
former  
times.

ditary, and it has been long a settled principle of English law, that on the death of the King his royal dignity descends immediately to his successor. That principle is not now to be controverted. It has been sanctioned by the practice of many centuries, and is become a fundamental maxim of constitutional law. But, in ancient times, the crown was not strictly hereditary, according to the rules of lineal descent, and an interval usually, if not constantly, intervened, between the death of a King and the recognition of his successor.

Under the Saxons the crown was elective. The King was usually chosen from a particular family, and when that rule was departed from, civil dissensions not unfrequently ensued. But among the members of the royal family there seems to have been an absolute liberty of choice, as favour, convenience, or accident determined. The son was preferred to the father, the brother to the son, and in one noted instance the line of the younger prevailed over the descendants of the elder brother, though the latter had worn his crown with credit and ability<sup>1</sup>. Illegitimacy was no exclusion.

The Conqueror, after his arrival in London, underwent the form at least of an election. Rufus, Henry I., and Stephen, according to modern notions, were usurpers. They were elected by their partisans, in opposition to competitors, who claimed, not only by right of inheritance, but, in two of the three cases, by previous treaties and stipulations. Henry II. succeeded to Stephen, not by hereditary right, for in that case his mother would

<sup>1</sup> The instance alluded to is that of Edward the Elder.—ED.

have been Queen, but in virtue of a convention with Stephen, which had been ratified by the chief nobles on both sides.

To prevent such evils as had followed the death of his grandfather, Henry II. had his eldest son not only appointed his successor, but solemnly crowned in his own lifetime. But the younger Henry having died before his father, the succession again became open ; and, notwithstanding the instances of Richard, who was next in the line of inheritance, no fresh nomination took place till a few days before the old King's death, when it was too late to have the transaction ratified in England before the throne became actually vacant. Richard, nevertheless, succeeded without opposition ; and he is the first King of England who can be said to have ascended the throne without the form at least of an election, and without any interval having elapsed between the death of his predecessor and his own accession. There are public acts in his name, dated in the first year of his reign, before his coronation had taken place<sup>1</sup>.

John was an usurper, and obtained the crown by election. An interregnum of more than seven weeks elapsed between the death of his brother and his own accession. Richard died on the 6th of April. John did not arrive in England till the 25th of May, and his coronation was not performed till the Ascension Sunday following, which fell that

<sup>1</sup> *Fœdera*, l. 48, 49. New Edition. Henry II. died on the 6th of July, 1189. Richard was crowned on the 3rd of September following.

year on the 27th of May. In his subsequent acts he dates the commencement of his reign, not from his brother's death, but from his own coronation ; and as that ceremony took place on a moveable feast, it happens that, in his public acts, every year of his reign begins on a different day from the preceding one.

At the death of John the kingdom was distracted with civil war. A great part of the nobles and many of the principal cities had sworn fealty to Lewis of France. But the party that had adhered to John, notwithstanding his perfidy and tyranny, recognized his son Henry as his successor. According to an author<sup>1</sup>, who lived in the time of Edward III., it was by a formal election, and not without opposition, that Henry was raised to the throne. Be that as it may, it was not till nine days after his father's death that he was crowned ; and from the computations of the years and days of his reign by contemporary historians, it appears that this interval was considered as an interregnum, during which the throne was vacant<sup>2</sup>.

Henry III. died while his kingdom was in tranquillity. His son Edward was absent from the country. No one contested his title. But so prevalent was still the notion of the English being an elective monarchy, that four days having elapsed between the death of Henry and the recognition of Edward as King, the accession of the latter was dated, not from his father's death, but from his own

<sup>1</sup> Hemingford, Gale, ii. 562.

<sup>2</sup> Gale, ii. 38. Matth. Paris, 289, 1009.



recognition<sup>1</sup>. Henry died on the 16th of November, and his son was not acknowledged King till the 20th. On that day Henry was buried in Westminster Abbey; and in the absence of Edward, who was still abroad, the nobles present at the funeral took the oath of allegiance to him before his father's grave was closed.

Since the accession of Edward I. there has been no interregnum, unless where the line of succession has been broken; and from the precedents adduced and opinions taken at the accession of James I., it was declared to be the law of England, "that there "can be no interregnum within the same<sup>2</sup>." It is now therefore an established maxim of constitutional law, that immediately on the death of the King the right of the crown is vested in his heir, who commences his reign from that moment<sup>3</sup>. To such an extent has this doctrine been carried, that on the restoration of Charles II. it was resolved by the judges, that from the instant of his father's death, though excluded from the exercise of the kingly office, he was King both *de jure* and *de facto*; and that, *therefore*, all those who had acted against him and kept him out of possession, in obedience to the powers then in being, were guilty of treason<sup>4</sup>. This extraordinary decision, which subjected almost every man in England, and some of the judges themselves, to be tried and condemned as traitors, was grounded on the narrow principle,

<sup>1</sup> Palgrave's Parliamentary Writs, 1st volume, Chronological Abstract, page 1st, note 1st.

<sup>2</sup> Howell's State Trials, ii. 626.

<sup>3</sup> Blackstone, i. 196.

<sup>4</sup> Foster, Crown Law, 402. Bacon's Abr. Prærog. A.



that in the interval between the execution of Charles I. and the restoration of his son, no one had assumed the title of King<sup>1</sup>. Had Cromwell, in imitation of Henry VII., picked up the crown from the mire where it was laid, and clapped it on his head, Sir Harry Vane and the others, against whom this act of sanguinary vengeance was directed, would have been secured by statute against the rancorous malevolence of their enemies.

Some disadvantages of hereditary succession.

The advantages of hereditary over elective monarchy are manifold and obvious; but there is one drawback in hereditary succession that cannot be denied. Princes who succeed by hereditary right are apt to confound the office they hold in trust for others with the private estate which a man inherits from his ancestors. Subjects, on the other hand, deceived by the analogies between these two sorts of inheritance, are led to believe that royalty belongs to the King as an estate belongs to its proprietor. From these misapprehensions many inconveniences have arisen. Whatever may be said for hereditary right, no one acquainted with the history of England can deny that cases may occur where it is necessary for the public good to change the order of succession, or even to declare the throne vacant when it is actually full. But on such occasions there is always a party found to resist the alteration on the ground that it is unjust to deprive any one of a possession he enjoys, unless it be under the authority of some positive and pre-existing law. The evil does not stop here. After the change has been effected, the same persons

<sup>1</sup> Foster, Crown Law, 403.

think it their duty to overturn the new settlement and restore the ancient line of princes, on the plausible though fallacious pretext that no misconduct in the possessor of the crown can bar his heirs of their just rights of inheritance. Persons inflamed with these sentiments forget that the crown is not merely a descendible property for the possessor and his heirs, but an office or trust for the benefit of others; that if it has been made hereditary, it is only for the purposes of public utility; and that to make the title to it indefeasible is to defeat the end for the sake of the means<sup>1</sup>.

There is, on the other hand, a disposition in Kings to regard as their lawful property the prerogatives exercised by their ancestors; and when abuses in the administration of their government have forced their subjects to curtail their power, they consider it an unjust invasion of their rights. If compelled to yield at the moment, they avail themselves of the first opportunity to recover the authority they have lost; and from their manifest impatience under the yoke imposed upon them, they become objects of suspicion to their subjects. It seldom therefore happens that great constitutional reforms can be effected without a change of dynasty. The ancient family, if left on the throne or recalled from exile, are continually on the alert to recover the prerogatives of which, in their opinion, they have been unjustly deprived. Our own history affords the strongest confirmation of these remarks. The deserved though melancholy fate of Charles I. made no salutary impression on

<sup>1</sup> Foster, Crown Law, 404-412.

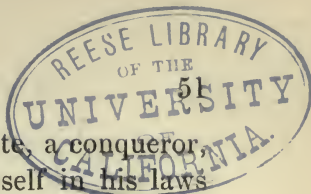
his sons. While they reigned, it was their constant struggle to emancipate themselves from the restraints of law, and it was only by a change of dynasty that the constitutional rights of the people were secured. It is a rare fortune, and peculiar to England, that we have a family on the throne who have no legitimate pretensions to the crown but what they derive from parliament. The act of settlement, which is the sole foundation of their title, has cut off all obsolete claims, whether derived from Egbert or from the Conqueror<sup>1</sup>.

Style and  
title of the  
King in an-  
cient times.

There is another topic, though of minor consequence, that tends also to illustrate the gradual introduction of the monarchical theory of our constitution into the language of public instruments of the government, in opposition to the original notions of royalty entertained by our Saxon forefathers. For many centuries before the union of the Scottish with the English crown, the title of the King had been that of King of England. In ancient times it was otherwise. During the Heptarchy, the petty Kings who ruled over the different tribes of Anglo-Saxons were styled Kings of the West Saxons, Mercians, Northumbrians, Kentishmen, East Angles, East Saxons, or South Saxons; and after the imperfect union of these states under the West Saxons, the title of the predominant prince continued to be taken from his subjects, and not from the territory they inhabited. There are exceptions, indeed, to this rule, in some of the Latin charters, which the clergy were left to fabri-

<sup>1</sup> Blackstone, i. 217.





cate in their own way<sup>1</sup>; but Canute, a conqueror, is the first prince that styles himself in his laws King of England. In the preamble to his collection of laws, he is called King of the Danes and Northmen, and of the whole land of the Angles<sup>2</sup>. This territorial designation, however, was dropped by his successors. The Confessor is styled King and Lord of the Angles<sup>3</sup>; and, notwithstanding the continual progress of feudal notions, the Conqueror, his sons, Stephen, and the two first Princes of the house of Plantagenet, continued to use on their great seal the appellation of *Rex Anglorum*, though in the preambles to their charters and other public instruments they sometimes call themselves Kings of England. John was the first prince who had engraved on his great seal the title of *Rex Angliæ*; and in that innovation, which has its origin in the feudal fiction that the whole soil of England belonged originally to the King, he has been followed by all his successors<sup>4</sup>.

### ALLEGIANCE.

Allegiance is the tie that binds the subject to the state in return for the protection he receives. In England it is due to the King as representative of the commonwealth. It is distinguished by the English law into natural and local, as it arises from birth, or from temporary residence under the King's protection. In the former case it is held to be per-

Doctrine of  
the English  
law.

<sup>1</sup> Heming, 122. Text. Roff. 16, 69, 70, &c.

<sup>2</sup> Anc. LL. and Inst. p. 153.

<sup>3</sup> Sax. Chron. in 1066.

<sup>4</sup> Co. Litt. 7. corrected from Sandford and Rymer.



petual and indefeasible by any act of the subject, due from all men born in the King's dominions immediately on their birth, and incapable of being forfeited, cancelled, or altered by any change of time, place, or circumstances, or by any power short of the legislature<sup>1</sup>.

Some consequences of this doctrine.

It would perhaps be more consonant to reason and natural justice, if a man, on attaining the age of maturity, were enabled by a solemn act to make choice of his country. But if his allegiance is to be altogether independent of his will, there must be some rule to determine the state to which he belongs; and no better criterion can be found than the place of his birth, a fact that in ordinary cases may be ascertained with facility on sure and conclusive evidence. If, however, the principle on which this view of the subject depends be carried to extremes, without reserve or limitation, it will be found in some cases productive of unintentional hardship, and in others pregnant with injustice and absurdity. Thus, for instance, the child of English parents, born accidentally out of the King's protection, is by common law an alien, incapable of holding lands in England. This injustice, it is true, has been in part corrected by statute; but another and more barbarous consequence of the common law doctrine of allegiance remains yet to be remedied. The son of a foreigner, born in any part of the King's dominions, or in any country that happens at the time of his birth to be governed in the King's name, is by his birth an English subject; and if taken in arms against the King of England,

<sup>1</sup> Blackstone, i. 366-370.

though it be in the service of his own government, he is liable to be tried and executed as a traitor. A right so repugnant to common sense and humanity has never, it is true, been exercised ; but the law, as it stands, leads to the strange anomaly, that the subject of a foreign prince may possess and exercise, if he pleases, all the rights of an Englishman. If born within the King's protection, he is qualified by the accident of his birth to hold lands in England, and to sit in either house of parliament. This strange consequence of the English law of allegiance arises from a principle—just and laudable in ordinary cases, though in this instance misapplied—that nothing but his own demerit can deprive a natural-born subject of his birthright.

Allegiance is founded in reason and in the nature of government. No state can exist unless those who enjoy its protection are faithful to its interests ; and he who seeks admission into its bosom, and accepts its protection, gives virtually an assurance of his fidelity<sup>1</sup>. But though the duty of allegiance be derived from principles of universal application, the degree of obedience due from subjects to the persons intrusted with the government of the state in which they live admits of an infinite variety of shades, and differs in every country according to rules settled by custom or established by law. It is not the same in a tribe of Arabs as in a Turkish

Measure of  
allegiance  
different in  
different  
countries.

<sup>1</sup> Qui se cœtui alicui aggregaverant, aut homini hominibusque subjecerant, hi aut expresse promiserant aut ex negotii natura tacite promississe debent intelligi, secuturos se id quod aut cœtus pars major, aut hi, quibus delata potestas erat, constituissent.—*Grotius de Jure Belli et Pacis. Prolegomena.*

camp ; it is different at Washington and at St. Petersburg ; it has been changed in France by the Revolution ; and it has no resemblance at the present day in England to the loose system of subordination that existed before the Conquest.

Obligations  
of allegi-  
ance con-  
sidered  
historically.

The doctrines of the English law respecting allegiance, whatever may be the objections to which they are liable, are not now to be disputed. They have been long settled in our courts of law, and are consecrated by time and authority. But it may be curious to inquire by what steps they were introduced, and through what gradations they had passed before they attained their present perfect form.

In England, as in the other kingdoms of Europe, the principles that regulate and the laws that enforce the duty of allegiance have been borrowed in part from the Roman empire, and are in part derived from the ancient usages of the Germans. At one period the rigid and strict rules of the empire have prevailed. At other times and in other places the more lax and flexible ties that held together a German community have, in practice at least, and sometimes even in law, predominated. As the one or other system exercised its influence, subjects have rendered an absolute or conditional obedience to their rulers.

Uncondi-  
tional oath  
of allegi-  
ance  
borrowed  
from the  
Roman em-  
pire.

In the republic of Rome, no one could lawfully serve in the army without taking the military oath, which bound him to be faithful and obedient to his general, saving the fidelity he owed to the Roman senate and people. On the destruction of public liberty the same oath was taken to the emperor as commander-in-chief of the army ; but the clause



in favour of the senate and people was omitted; and instead of being limited to the soldiery, the oath was extended to all magistrates and citizens, and ultimately to the provincials. It was administered at the accession of every emperor, and renewed at stated periods during his reign<sup>1</sup>. When the Kings of the Franks had obtained from Justinian the cession of his rights in Gaul, they were not long in reviving and establishing a practice so favourable to the increase and stability of their power. As early as 561, on the death of Clotaire I., the last surviving son of Clovis, the inhabitants of Tours were made to take an oath of fidelity to his son Caribert; and when Caribert died, a similar oath was exacted from them to his brother Sigebert. On the death of Sigebert the cities that had been subject to his authority were required to swear fealty to his brother Gontran and to his son Clotaire<sup>2</sup>. The practice may be considered as by that time fully established among the Franks; and in one of the formulas collected by Marculfus<sup>3</sup>, the manner of administering the oath is described to us. The count in every district was directed to summon all the inhabitants, Franks, Romans, and others, to meet in the towns, villages, and castles most convenient for them, and there, in presence of the King's envoy, to make them swear fealty to the King on the relics of saints, or in some other form consecrated by religion.

This usage, introduced by the first race of Kings, was continued by the Carolingians. No one above

<sup>1</sup> Mém. de l'Acad. des Inscript. xxi. 318-332.

<sup>2</sup> Dom. Bouquet, ii. 227, 295, 350.

<sup>3</sup> L. i. 40.



the age of twelve was exempt from taking the oath of fealty. Ecclesiastics were subject to it as well as laymen, and vassals as well as independent freemen. The words of the oath in the time of Charlemagne were simple and concise. "I promise," said the person to whom it was administered, "to stand by my lord Charles and his sons, for I am and ever shall be faithful to him all the days of my life, without fraud or guile." Additions to these words were afterwards made, but without substantially enlarging the obligation they imposed. The subject bound himself to aid the King with his counsel and person, to defend his honour and authority, and never to attempt any thing to his prejudice or to the disturbance of his government<sup>1</sup>.

The oath of a Roman soldier to his Emperor had been absolute and unconditional<sup>2</sup>; and when adopted by the Barbarians, and transferred to the new monarchies they erected, it continued in form to have the same character. Some high-minded chiefs appear to have objected to it on that account. A precept of Pepin, King of Italy, informs us there were persons, so late as the eighth century, who refused to take the oath of fealty when required of them<sup>3</sup>. It was probably to vanquish these scruples that an oath in return was exacted from the King to his subjects, by which he bound himself to maintain them in all their rights and privileges, to administer to them justice in mercy, and if from bad

Coronation  
oath exact-  
ed from  
Kings.

<sup>1</sup> *Théorie des Lois politiques de France*, iii. Preuves, 7–20.

<sup>2</sup> *Vegetius, Inst. Milit.* l. ii. c. 1.

<sup>3</sup> *Cap. Pippin. Reg. Ital. in 793*, § 36. *Baluz. i.* 541. *Qui per superbiam jurare noluerint.*

advice any errors should have crept into his government, to correct them when pointed out to him<sup>1</sup>. By this engagement the obligations of the prince and people became mutual. If the King violated his oath, the subject was released from the allegiance he had sworn. A capitulary of Charles the Bald gives express permission to his subjects to assist one another and to confederate against him, in case he infringed their privileges or was guilty of injustice, and refused to amend his errors<sup>2</sup>.

With the oath of fidelity borrowed from ancient Rome was conjoined a form of obligation unknown to the Romans. Every member of a German state must have been bound by duty, as well as by regard to self-preservation, to defend the community to which he belonged; and if he betrayed or deserted its interests, he was punished with death<sup>3</sup>. But where there was no permanent chief, there could be no bond to any individual of the nature of allegiance. Obedience was due from soldiers to their general; but in national wars the authority of the general ceased with the return of peace, and in expeditions undertaken by private adventurers it must have ended with the conclusion of the enterprise. There existed, however, one permanent bond of connexion among the Germans, peculiar to that people. Every German chief was surrounded by a band of followers or companions, who had voluntarily attached themselves to his person. These men constituted in peace his pride and ornament,

Homage  
derived  
from the  
Germans.

<sup>1</sup> Baluz. ii. 101.

<sup>2</sup> Capit. Carol. Calv. t. xix. § 10. Baluz. ii. 82.

<sup>3</sup> Tacit. de Mor. Germ. § 12.

in war his strength and security. They gave him weight at home and consideration abroad. It was the ambition of every chief to excel in the number and valour of his companions. To be received into the train of a distinguished warrior was an honour, and to rise in his service and merit a conspicuous place in his esteem was the object of emulation among his followers. In battle it was disgraceful for the chief to be outdone by his companions, and disgraceful for the companions to fall short of their chief. It was their duty to protect and defend his person; and if he fell, it was infamous to survive him (N). Whatever glory they acquired, they attributed to him. He fought for victory, they for their chief. Admiration and affection formed the basis of this connexion, and it was cemented by presents and acts of kindness. The companions feasted at the table of their chief, and received from him arms and horses in reward of their devotion to his service. War and plunder furnished him with the materials for his bounty. If his own tribe languished in peaceful inactivity, he sought some neighbouring state engaged in warfare; and, by the services he rendered and the spoils he gained, he added to his fame as a warrior, and acquired the means of indulging his munificence and gratifying his followers<sup>1</sup>.

This singular institution the Germans carried with them into the countries they subdued, and it became the chief bond of political union in the governments they established. Every chief of reputation had a body of warriors devoted to his per-

<sup>1</sup> Tacit. de Mor. Germ. § 13, 14.



son. In war they attended him to the field, and in peace they were his guests and companions. The hospitality he afforded them was maintained out of the conquered lands that fell to his share ; and as the King, from his rank and position in the state, was the great dispenser of the national property, it became the object of every subordinate chief to attach himself to the monarch. Every one solicited admission among the companions of the King, and professed to him the same devotion which from his own immediate followers he had been accustomed to receive. A formula of Marculfus<sup>1</sup> describes to us a chief coming to the palace with his followers, and placing his hands within the King's hands, pledging his troth and swearing fealty to the King ; in return for which he was received into the order of Antrustions, or guests of the King, with the privileges attached to that distinction. Charlemagne published a capitulary<sup>2</sup> forbidding any one to refuse lodgings or deny provisions at a reasonable rate to the persons repairing to court on that errand. Homage was the name given to this profession of attachment and devotion to a superior, and it was regarded as the most sacred and intimate connexion that could subsist between one man and another. It was unaccompanied by any oath, but was always followed by an oath of fealty. The inferior was styled the man, homager, or vassal of the other, who was called his lord or seignior. The same individual might be the vassal of one person and the lord of another ; and when homage, ceasing to be

<sup>1</sup> L. i. 18.

<sup>2</sup> Carol. M. Leg. Langobard. 11. Canciani. i. 150.



a mere personal bond of union, came to be connected with land, a man might have as many lords as he had tenements.

To be the companion of a distinguished chief had been honourable among the Germans. To be the man or immediate vassal of the King was both honourable and profitable. The possessor of that privilege was elevated in dignity above ordinary freemen. He had a higher composition for injuries done to him<sup>1</sup>. He was exempt from the jurisdiction of inferior tribunals, and could not be tried except in the King's court<sup>2</sup>. He had means of access to the King, not enjoyed by ordinary freemen; and had thereby opportunities, not only of recommending himself for offices and employments, but of obtaining, under the name of beneficiary lands, a larger portion of the national property for his use. If he owed more than ordinary obedience, and professed more than ordinary devotion to the King, he was entitled to greater protection in return. A condition attended with such advantages had many who aspired to it. Freemen who were not vassals of inferior lords sought to be included among the men or immediate followers of the King; and in time few persons remained who were not immediate vassals of the King, or vassals of others who stood directly or remotely in that relation to the monarch.

Respect and reverence were due from the man

<sup>1</sup> L. Ripuar. t. 7. t. 11. § 1. L. Sal. Ref. t. 43. § 1, 4, 6, 7; t. 44. § 1, 2, 4.

<sup>2</sup> Formul. Lindenbrog. § 177, apud Baluz. ii. 544. None but the King, says an Anglo-Saxon law, has jurisdiction over a King's thegn. LL. Æthelr. iii. 11.

or vassal to his lord. In other points their obligations were mutual. If the vassal was bound to defend his lord, the lord in return was bound to protect his vassal<sup>1</sup>. It was the want of this protection that diffused the system of vassalage over Europe till it became nearly universal. In the anarchy that followed the conquests of the Barbarians, and their subsequent dispersion over the countries they had subdued, men were compelled to seek that protection from the powerful which they could not obtain from the laws and government<sup>2</sup>.

The connexion of a chief with his companions was in its origin voluntary, and in its nature conditional. Founded on compact, and established on the basis of mutual services and obligations, a breach of covenant on either side released the other party from his engagement (O). It was therefore better calculated to serve as the groundwork of a free government, than the servile submission that formed the only relation between the Roman emperors and their subjects. Accordingly, at a very early period after the conquests of the Barbarians, we find homage established as the great bond of connexion between the chief and inferior members of the commonwealth. When Tassilo, duke, as he

<sup>1</sup> Glanville, l. ix. c. 1. *Mutua debet esse domini et homagii fidelitatis connexio, ita quod quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio, præter solam reverentiam.* See also Bracton, l. ii. c. 35. § 2, and Fleta, l. iii. c. 16. § 20.

<sup>2</sup> Montlosier, *Monarchie Française*, i. 352-361. Hallam, *Middle Ages*, i. 169. 8vo. Guizot, *Essais sur l'Hist. de France*, 174.

is called, or general of the Bavarians, submitted to Pepin, King of the Franks, he repaired with the chief men of his nation to that prince, and placing his hands within the hands of Pepin, according to the usage, as we are told, of the Franks, he became his vassal or homager, and afterwards swore fealty to him and his sons on the relics of St. Denis. The oath of fealty annexed to homage is without reserve or limitation ; but homage being essentially a conditional obligation, the fealty attached to it was considered as partaking of that quality, so that when the conduct of the superior absolved his man from the tie of homage, the obligation of fealty was held to expire with it.

It was not, however, from the whole body of his people that homage to the King was expected or received. The chief persons of the state and his immediate vassals were required to do him homage. The rest of his subjects took an oath of fealty without homage. This distinction is marked with the greatest clearness in the laws of the Visigoths. On the election of a new King, every one possessed of a palatine office was bound to come into his presence and swear to him fealty according to ancient usage. Inferior persons were convoked in their several districts, and had the oath of fealty administered to them by the oath-exactor, who was sent into the province for the purpose <sup>1</sup>.

<sup>1</sup> Leg. Visigoth. l. 2. t. 1. l. 7. Many centuries afterwards the same distinction was made by Baldus in a comment on the peace concluded at Constance in 1183 : *Vasalli tanquam vasalli, et ceteri omnes tanquam subditi, debent jurare fidelitatem principi.* Apud Meyer, *Espr. de Instit. Judic.*, i. 190.



It is not my object to follow the relations of chief and retainer in their decline, when, disfigured by selfishness and rapacity, they became a source of discord and instrument of oppression. I may, however, be permitted to remark, with one of the most candid of modern writers, that it is from the connexion of chief and companion we derive all that is noble or genuine in the sentiment of disinterested loyalty. Mutual confidence and devoted attachment were essential to that union. Every young man was educated in notions of fidelity to his adopted chief, of respect for his will, and affection for his person ; and when changes in the constitution of society led him to regard the King as his natural lord, he insensibly transferred to this state idol the sentiments of generous and elevated devotion, in which he had been nurtured towards the household gods of his ancestors. In the party connexions of free states, when animated by the spirit of some great and distinguished leader, we have another and perhaps a more genuine relic of the temper of mind and character that gave life and vigour to the more ancient institution.

In the early part of the Anglo-Saxon history, there is no mention of any general oath of fealty or allegiance being exacted from the people. The oath taken by the King at his coronation implies indeed a corresponding obligation on the part of the subject ; and it is not improbable that the persons present on that occasion entered into some formal engagement towards their sovereign. To be faithful to their natural lord is a common topic of exhortation with the Anglo-Saxon clergy in their

Mutual engagements of Kings with their subjects and of lords with their men among the Anglo-Saxons.



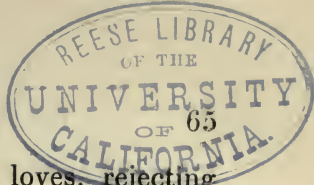
addresses and homilies to the people; and on the accession of Canute we are told by an ancient author<sup>1</sup>, that the great men of the kingdom swore fealty to him, and that in return he swore to be a faithful lord to them according to the laws of God and man. But there is no trace among the Anglo-Saxons, as among the Franks, of a general oath of fealty to the King from all his subjects. It is true that in one of the laws attributed to the Confessor<sup>2</sup> it is said, that all freemen in England were bound to meet once a year in the *folcgemot*, and in presence of the bishops to take an oath of fealty to the King. But there is no allusion to this practice in the chronicles or general laws of the Anglo-Saxons; and from the fabulous circumstances blended with the story, it may be set aside as totally unworthy of credit. Whoever was the compiler of that spurious collection of laws, he probably took his account of this supposed regulation from the usages of his own times. For many ages after the Conquest, it was the custom to assemble in the court leets and sheriffs' tourns, all persons of inferior condition, who had attained the age of twelve, and to exact from them an oath of fealty to the King<sup>3</sup>.

The most ancient oath of allegiance, that occurs in any English historian, is to be found among the laws ascribed to King Edmund, who reigned from 940 to 946. "Let every man," says the law, "swear such fealty to King Edmund as a man owes to his lord, without strife or disturbance, in sight

<sup>1</sup> Flor. Wigorn. in 1016.

<sup>2</sup> Anc. LL. and Inst. p. 268.

<sup>3</sup> Britton, ch. 29.



“and in secret, loving what he loves, rejecting  
 “what he rejects<sup>1</sup>.” It follows from these words,  
 that the fealty sworn to the King was the same  
 which a man owed to his lord ; and that to judge  
 of the nature and extent of the obligation which  
 this oath imposed on the subject, it is necessary to  
 know exactly what was the engagement of the man.

Mably laments<sup>2</sup> that the oath of the Antrusion  
 to the King is not given by Marculfus ; and from  
 the silence of subsequent authors it may be inferred,  
 that the loss is not supplied by any collection of  
 laws or judicial forms extant on the continent. We  
 have been more fortunate in England. The oath  
 of a man to his hlaford is preserved among the  
 Anglo-Saxon laws<sup>3</sup>. It is called the *hyld-ath* or  
 oath of fealty, and its tenor is as follows. “I shall  
 “be faithful and true to N, and love all that he  
 “loves, and shun all that he shuns, conformably  
 “to the laws of God and man, and never willingly,  
 “nor wittingly, by word or deed, do aught that is

<sup>1</sup> Ut omnes jurent in nomine Domini, pro quo sanctum illud  
 sanctum est, fidelitatem Edmundo Regi, *sicut homo debet esse fide-  
 lis domino suo*, sine omni controversia et seditione, in manifesto,  
 in occulto, in amando quod amabit, nolendo quod nolet, et ante-  
 quam juramentum hoc dabitur, ut nemo concelet hoc in fratre  
 vel proximo suo plusquam in extraneo.—Bromton, c. 859. I  
 have not translated the last part of the oath, because I do not  
 understand it. The qualifying clause is taken from the oath to  
 Charlemagne, preserved in the Formul. Lindenbrog., § 40, where  
 the person swears fealty, *sicut recte debet esse homo domno suo*.

<sup>2</sup> Obs. sur l'Hist. de France, l. 3. ch. 3. note 3.

<sup>3</sup> Anc. LL. and Inst. p. 76.—This oath is preserved in the  
 Textus Roffensis, f. 38 b. Hickes, in his Dissert. Epist. p. 112,  
 refers it to the Dano-Saxon period of the language ; but in sub-  
 stance it must be of far greater antiquity, as the connexion it  
 describes existed in the woods of Germany.

“hateful to him, on condition that he keep me as  
 “I am willing to earn, and all that fulfil, which was  
 “agreed upon between us, when I submitted to  
 L “him and chose his will<sup>1</sup>.”

From these words it is clear, that the engagement of a man with his hlaforð was voluntary, inasmuch as it was founded on compact; and conditional on the part of the man, inasmuch as he was released from the engagement he had contracted, in case the hlaforð failed in performing his part of the agreement. When exacted from subjects to their King, it ceased to be voluntary, but it continued to be conditional. It was not absolute, unlimited fealty, which the subject swore to the King, but

<sup>1</sup> Among the *Formulæ Sirmondicæ* there is one, § 44, entitled, “*Qui se in alterius potestate commendat*,” which describes an engagement between an inferior freeman and his lord, similar to the one implied in the *hyld-ath* of the Anglo-Saxons; but the terms of the engagement intimate a greater disparity of condition between the parties than appears in the Anglo-Saxon oath, the inferior being represented in a forlorn and destitute condition, and in these circumstances soliciting admission into the service and protection of his lord. That the reader may judge for himself, I subjoin the formula entire. “*Domino magnifico illo, ego enim ille. Dum et omnibus habetur percognitum qualiter ego minime habeo unde me pascere vel vestire debeam, ideo petii pietati vestræ et mihi decrevit voluntas, ut me in vestrum mundeburdum tradere vel commendare deberem, quod ita et feci, eo videlicet modo, ut me tam de victu quam et de vestimento, juxta quod vobis servire et promereri potuero, adjuvare et consolare debeas, et dum ego in caput advixero, ingenuilli ordine tibi servitium vel obsequium impendere debeam, et me de vestra potestate vel mundeburdo tempore vitæ meæ potestatem non habeam subtrahendi, nisi sub vestra potestate vel defensione diebus vitæ meæ debeam permanere. Unde convenit ut si unus ex nobis de his convenientiis se emutare voluerit, solidos tantos pari suo componat et ipsa convenientia firma permaneat.*”



such fealty as a man owed to his lord. If a breach of compact on the part of the hlaford released his man from the engagement he had sworn, it follows, that as far as the oath of fealty was concerned, a breach of compact on the part of the King must equally have released his subjects from their allegiance. What terms or compact the King was understood to have made with his subjects we are not informed. They were probably of a loose, indeterminate nature, and settled by custom rather than regulated by law ; but if broken on the part of the King, the subject by the very terms of his oath was released from the fealty he had sworn (P).

One instance is recorded where stipulations more formal than usual appear to have been made between the King and his people. Æthelred II. had been expelled from his kingdom by the Danes, after giving innumerable proofs of his incapacity and unfitness to reign. On the death of the Danish monarch, who had been raised to the throne in his place, his former subjects, desirous to have again a king of their own nation, sent him word that they would take him back as their King, provided he would govern them better than he had done before. The exiled prince gladly accepted their offer, and assuring them he would be a faithful hlaford to them in future, pledged himself to amend whatever they disliked in his government. On these terms, with mutual promises and stipulations on both sides, he was restored to his kingdom<sup>1</sup>.

This is the only instance I have found in Anglo-

<sup>1</sup> Saxon Chronicle in 1014.



Saxon history of a formal compact between the King and people. But there are several examples of princes deposed for misgovernment, which implies, that in the opinion of that people, the relation of King and subject was founded on a compact, tacit or expressed, and that a breach of conditions on the side of the King released the subject from his allegiance. In the eighth century a King of the West Saxons, of the name of Sigebryht, was driven from the throne for his illegal conduct by sentence of his witan<sup>1</sup>. Nearly about the same time the unjust and tyrannical government of Beornred, King of the Mercians, excited a general combination of his subjects, of all ranks and degrees, against him, which led to his deposal and to the election of Offa, a distant relation of the royal family, in his place<sup>2</sup>. Many similar instances might be given ; but, without referring to such extreme cases, the general fact is undeniable, that the authority of the Anglo-Saxon Kings over their subjects was precarious, weak, and ill defined. An author, who lived under the Conqueror, mentions the unbridled ferocity of the northern and western parts of England, where the people under their ancient Kings had prided themselves on rendering no greater obedience to the laws than was agreeable to themselves<sup>3</sup>.

<sup>1</sup> Saxon Chronicle in 755.

<sup>2</sup> Westm. in 758.

<sup>3</sup> Orderic. Vital. l. 4. apud Maseres, 209. Speaking of the state of England soon after the Conquest, he observes, " Circa terminos regni, occidentem aut plagam septentrionalem versus, cfrænīs adhuc ferocia superbiebat; et Angliæ regi, nisi ad libitum suum, famulari, sub rege Edwardo aliisque prioribus, olim despexerat."

There is another observation to be made on the Anglo-Saxon oath of a man to his hlaforð. It contains no reservation of fealty or obedience to the King ; and the question naturally occurs, what was the duty of a man, who had contracted that obligation, when a quarrel arose between the King and his immediate lord. There is no provision in the oath for this contingency, and no clear indication from history what was considered to be the duty of the man in such an event. In the account given by the Saxon Chronicle of the civil war between the Confessor and Earl Godwin, there are some obscure intimations that the thegns of the latter were bound to maintain the quarrel of their immediate lord till released from the engagement they had contracted with him ; but the facts are not stated with such precision as to enable us to draw any certain conclusion from them<sup>1</sup>. When such cases occurred, and in those remote times they were not unfrequent, it is probable that in England, as on the continent, the men ranged themselves on one side or the other, as interest, fear, or affection dictated.

The law of England appears to have continued in this respect in the same unsettled state till the Norman conquest was completely established. The Conqueror was not a prince to content himself with the qualified obedience that had satisfied the Anglo-Saxon Kings. At the very outset of his reign he gave a sample of the different spirit of his government in his conduct towards the inhabitants of Exeter. Having intelligence that they were pre-

Changes  
effected by  
the Con-  
queror.

<sup>1</sup> Sax. Chron. in 1051.

paring to take up arms against him, he sent to the principal citizens and ordered them to take the oath of fealty. They declined, and refused even to admit him within their walls, but offered to pay him the customary tribute due from their town. He replied, that it was not his fashion to have subjects on such terms, and marching against them, he compelled them, after a slight resistance, to surrender at discretion<sup>1</sup>. The same character is visible in all the other acts of his reign. One of his laws obliges every freeman in his dominions to take an oath of fealty to his person without reserve or qualification<sup>2</sup>; and in the latter part of his life, he assembled all the landholders of any account throughout England, whose men soever they were, and compelled them to become his men, and to swear fealty to him against all persons whatever without any exception<sup>3</sup>.

This was an important step in the system of feudal subordination. Charlemagne had enacted, that no person should take an oath of fealty to any one except to the King and to his own lord; but he had placed the King and private lord on the same footing, and in the event of any difference between them, he had not ventured to declare, that the obligations of the vassal must give way to the duty of the subject<sup>4</sup>. So late, indeed, as the time of St. Lewis, the vassals of a mesne lord in France were in certain cases bound by law to serve their lord

<sup>1</sup> Orderic. Vital. lib. 4. apud Maseres, 210.

<sup>2</sup> Leg. Will. Conq. iii. 2.

<sup>3</sup> Saxon Chronicle in 1086.

<sup>4</sup> Capit. 2. in 805. § 9.



against the King<sup>1</sup>. In Italy, after an interval of seventy years, the example of the Conqueror was followed by Frederick Barbarossa. In a diet held by that prince at Roncaglia, soon after his short-lived triumph over the Lombard republics, it was enacted by his authority, that in every oath of fealty from a vassal to his lord, the Emperor should be excepted by name<sup>2</sup>. In England, when Glanville wrote, it was an established principle of law, that in every oath of fealty to a subject the tenant was to except the fealty he owed to the King and to his heirs<sup>3</sup>.

This innovation led to the distinction of liege homage and fealty, from simple, feudal, or predial homage and fealty<sup>4</sup>. Liege homage, from which comes the word allegiance, was due to the King as sovereign lord of the state, and had no relation to tenure<sup>5</sup>. Simple homage, though originally a personal engagement, was in latter times, in England at least, necessarily connected with some fief, no one in this country being permitted to do homage to a subject for vassalage alone, without some tenement or service<sup>6</sup>. It was some time, however, before the term liege-homage was restricted by English lawyers to the homage rendered by a subject to the King. So late as the reign of Edward I., the words liege lord and liegeance were used to express

<sup>1</sup> Etablissemens de St. Louis, ch. 49. Montlosier, l. 434.

<sup>2</sup> Muratori, Script. Ital. vi. 789.

<sup>3</sup> Glanville, l. 9. c. 1.

<sup>4</sup> Spelman's Remains, 36. Hale, P. C. 65. 70.

<sup>5</sup> Spelman's Glossary, Homagium.

<sup>6</sup> Glanville, l. 9. c. 2. Bracton, l. 2. c. 35. § 6. Nec pro solo dominio fit homagium, nisi soli regi vel principi, sine tenemento vel servitio.



feudal relations between subjects. He was said to be liege lord, from whom the tenant held his principal messuage or tenement, or to whom he had made his first profession of homage<sup>1</sup>.

The oath required by the Conqueror from his subjects, though tinged with feudal expressions, seems to have been an absolute, unconditional engagement of service and fealty against all the enemies of his crown and kingdom. But, while the feudal system was in vigour, there can be little doubt that in England as in France, the obligation was considered to be conditional, and liable to be cancelled by the injustice or misgovernment of the King. In France we are told, that the faith and homage rendered to Philip Augustus contained a promise of fealty so long only as the King did justice in his court. St. Lewis admits the legality of private war against the King who denies justice to his subject; and if any near vassal refused to serve his lord in the prosecution of the quarrel, he declares the fee of the vassal legally forfeited to his lord<sup>2</sup>. Similar notions, though not admitted into our law books, prevailed about the same period, in a less degree, in England.

Diffidation.

When two persons, whether King and subject or two subjects, were living in amity, and connected by any tie that implied mutual faith and confidence, it was reckoned traitorous for either party to commit a hostile or violent act against the other, with-

<sup>1</sup> Glanville, l. 9. c. 1. Bracton, l. 2. c. 35 and 37. Fleta, l. 3. c. 16. § 16. Britton, ch. 68.

<sup>2</sup> Montlosier, Monarchie Française, i. 434. Etablissements de Saint Louis, l. 1. ch. 49.

out giving him due notice of the intended aggression. This notice was called *diffidatio*, which is usually translated defiance, though, properly speaking, it means to undo, break off, renounce or withdraw the faith or protection due or promised to another. If two barons, two knights, or even two burghers, who had the right of private war, were living in peace and security with respect to each other, it was not lawful for the one to attack or use violence against the other without a regular notification of his purpose<sup>1</sup>. Innumerable regulations on this subject are to be found in the laws and institutions of the continent; and neither the name nor practice of diffidation were unknown in England.

William of Malmsbury censures Stephen for attacking by surprise the Earl of Chester and his brother, because he had parted from them in friendship some time before, and had not previously, according to ancient usage, put them out of his protection, or, as it is called, defied them<sup>2</sup>. Philip Augustus, before he received the homage of Arthur, Duke of Brittany, declared John, King of England, out of his faith and protection as a vassal of France<sup>3</sup>. Henry III. began hostilities against William, earl mareschal, by sending him a formal diffidation through the bishop of St. Asaph; and when the earl was afterwards solicited to submit himself to

<sup>1</sup> Ducange, Gloss. Diffidare, Diffiduciare. Diffidare proprie est a fide quam quis alicui debet aut pollicitus est, per literas aut epistolam deficere. Item, declarare aliquem a fide, quam debebat, defecisse. Ib. Supp. Vel inter dominum et vasallum, vel inter affidatos. Spelman, Gloss.

<sup>2</sup> Malmsb. Hist. Novell. lib. 2. f. 105. b. quod diffidiare dicunt.

<sup>3</sup> Spelman, Gloss. Diffidatio.

the King's mercy, he justified his refusal on the ground that the King had, without trial by his peers, declared him out of his royal protection, and made war on him as a public enemy. "I am no traitor," says the earl; "the King has, without judgment of my peers, deprived me of my honours and laid waste my lands; twice he has put me out of his protection<sup>1</sup>, while I demanded and was ready to abide by the judgment of my peers in his court. I am no longer his man, and by his own act have been absolved from the homage I had rendered him. It is therefore lawful for me to defend myself, and to resist the evil counsellors that surround him by all the means in my power<sup>2</sup>."

The same reign affords another illustration of this usage. Before the battle of Lewes the confederate barons sent a message to the King, professing fealty and obedience to him, but complaining of those about him, who they said were as much his enemies as theirs. The King in reply took part with his friends, declaring all persons, who were enemies to them, out of his protection; and the barons of his party, retorting the taunts of their adversaries, gave the lie to their accusations, and renounced all alliance of faith and amity with them. Having received these letters of diffidation from the King and his partizans, the confederates prepared for battle<sup>3</sup>.

<sup>1</sup> "Semel et iterum me diffidavit; cum semper paratus essem in curia sua juri parere, et stare judicio parium meorum. Unde homo suus non fui; sed ab ipsius homagio, non per me, sed per ipsum, licenter absolvebar."

<sup>2</sup> Matt. Paris, 388.

<sup>3</sup> Ib. 994. The King's reply to the barons is called *litera*



A still more remarkable act of diffidation is one that took place at the deposal of Edward II. Without entering into the justice or necessity of that measure, the mode of conducting it deserves notice as illustrative of the opinions entertained in that age with respect to the mutual relations of King and subject. While Edward was still King, Sir William Trussell appeared before him as proxy for the lords spiritual and temporal and others, and in their name, and in virtue of the full and sufficient powers with which they had invested him, he renounced and withdrew the homage and fealty appertaining to Edward as King of England, from his constituents, declaring them free and quit from such homage and fealty in time to come, in the best manner that law and custom warranted, protesting that thenceforward they were not to be deemed in his fealty or allegiance, or to hold any thing from him as King, but were to consider him as a private person altogether divested of royal dignity<sup>1</sup>. From this proceeding, however questionable in other respects, it appears that according to the notions of that time the subject had a right, for good and sufficient reasons, to renounce his homage and fealty to the King, in the same manner as the King had for similar reasons a right to put the subject out of his faith and protection.

Deposal of  
Edward II.,

The same forms were observed at the deposal of <sup>and of</sup> Richard II.

diffiduciationis. The expression he uses, when praising his friends, is eorum inimicos diffidamus. The barons of his party consider themselves diffidatos by the confederates, and in return treat them tanquam hostes publicos a hostibus diffidatos.

<sup>1</sup> Knyghton, 2550.



Richard II. with this difference, that before the subjects of that prince renounced their allegiance by a formal and public act, he had abdicated the government and absolved his lieges from the homage and fealty they had sworn to him (P).

There is still preserved in the law of England a remnant of this ancient right. If an alien enemy, who has the benefit of the King's protection, compasses the King's death, he is guilty of treason. But if he publicly renounces the King's protection, he is to be dealt with, say the lawyers, as an enemy ; a proceeding, observes Sir Matthew Hale, that has some analogy to what was anciently called *diffidatio* or defiance<sup>1</sup>.

While Normandy and other transmarine possessions were attached to the crown of England, persons who had estates on both sides of the channel must frequently have been placed in situations where they were compelled to exercise the right of diffidation. The same must have happened while England and Scotland were in general habits of amity, interrupted occasionally by temporary hostilities. At the battle of the Standard we are told that Robert de Brus, a Norman baron, who had estates in Scotland, thought it necessary, before the action commenced, to renounce his homage and fealty to the Scottish crown. But with the loss of Normandy and adjacent provinces of France, and with the cessation of all friendly intercourse with Scotland, this necessity was at an end ; and, when the practice fell into disuse, the right appears in

<sup>1</sup> Hale, P. C. 60, 92.

the case of individuals to have been extinguished, though in the instances just quoted it continued to be exerted on the part of the public. The great men had not in England, as in Spain, a right to renounce their country on the ground of some personal offence; nor having made that renunciation, could they lawfully enter into the service of a foreign prince and assist him in making war on their native land. This singular privilege, which was called *desnaturalizarse*, appears to have been frequently exercised by the Spanish nobles, and to have been not only sanctioned by law, but subjected to various minute regulations, on the due performance of which its legality depended. If any great man, who thought himself aggrieved, was desirous to renounce his country with all the rights, privileges, and obligations of a natural-born subject, he was bound in the first instance to renounce his vassalage and allegiance, and give back to the King all the lands and castles he held from the crown. He was then to demand the term allowed him by law to quit the country, with as many of his followers and adherents as chose to accompany him. In his route to the frontiers he was entitled to have provisions for himself and his companions on making payment for them, and in return he was bound to commit no devastations in the district through which he passed. He might afterwards enter into the service of a foreign prince, and under certain restrictions, engage in hostilities against his country, without incurring the imputation of having failed in his allegiance to his natural lord (Q).

Right of the  
ricos omes  
in Spain to  
renounce  
their coun-  
try.

This privilege of the *Ricos omes* in Spain was

favoured by the division of that peninsula into a number of independent states; and, with many other peculiarities in the Spanish constitution, it had most probably its origin in the loose connexion between the petty princes of that country and the private adventurers, by whose assistance it was recovered from the Moors. Many of these adventurers were foreigners, who owed no natural allegiance to Spain; and, though actuated by the same spirit that led other crusaders to the Holy Land, it was customary for them, before lending their aid against the infidels, to make a bargain for themselves and followers with the prince under whom they were to serve, reserving in the territories they might subdue greater privileges and immunities than were possessed by persons of the same rank in other parts. But though England was gained by conquest, and gradually reduced to subjection by William and his followers, the latter obtained no such privileges from their chief. It appears indeed from the celebrated answer of Earl Warrene<sup>1</sup> to the commission of *quo warranto* issued by Edward I., that a vague notion was prevalent among the descendants of the first conquerors, that they held their lands and possessions in England by the same tenure as the King held his crown. No pretension, however, was made of any right to quit his service, when they pleased, and transfer their allegiance to another prince.

Question,  
whether al-  
legiance is  
due to the  
King in his

But, though the maxim—*nemo potest exuere patriam*—which, according to Foster, comprehends the whole doctrine of natural allegiance, is held in

<sup>1</sup> Rapin, Hume, &c.



the law of England to have no exception, and the violation of it to admit of no excuse, a question has arisen, to whom is that inalienable allegiance due? We are told, that it is due to the person of the King<sup>1</sup>; and, as the King in his politic or ideal capacity constitutes the state, there can be no doubt of the general truth and correctness of this proposition. But the King has a natural as well as a politic capacity, and both are united in the same person. If the King, in his natural capacity, should act in opposition to the duties he owes in his politic capacity, it may be asked, does the allegiance to his person remain indefeasible? If it does, what becomes of the doctrine maintained by one of the highest of our law authorities, “that resistance to the person of the King is justifiable, “when the being of the state is endangered and “the public voice proclaims such resistance necessary<sup>2</sup>?” If it does not, it cannot be true, that, in all cases, allegiance to the person of the King is indefeasible and inalienable.

natural or  
in his politic  
capacity.

The question whether the allegiance due to the King be applicable to him solely in his regal and political capacity, has been frequently stirred in former times, and the most contradictory answers to it have been given.

It was one of the charges against the Despensers, the favourites of Edward II., that they had drawn up and promulgated a bill or paper, wherein they maintained, that homage and allegiance had more regard to the crown than to the person of the King, and bound the subject more to his crown than to

Judgment  
against the  
Despensers.

<sup>1</sup> Blackstone, i. 371.

<sup>2</sup> Ib. i. 251.



his person ; from which they inferred, that if the King was not guided by reason in his administration of the kingdom, it was the duty of his lieges, if they kept their oath to the crown, to bring him back to reason, and even to employ force, if necessary, to redress the errors of his government ; for, if he is bound by his oath to govern his people and his lieges, his lieges are equally bound by their oath to govern in aid of him and in default of him<sup>1</sup>.

For these and other offences the Despensers were banished and their estates confiscated. It is singular enough, that the act against them was obtained by persons who were at that very time in arms against the King ; that it was repealed as soon as he had recovered his authority ; and that it was renewed in the first parliament of his son, immediately after the doctrine it condemned had been practically enforced by the deposal of the King and formal renunciation on the part of his subjects of the faith and allegiance they had sworn to him.

The renewal of the act against the Despensers, “ in all its points according to the tenor of every “ article contained therein<sup>2</sup>,” seems to establish as the deliberate opinion of the legislature, that allegiance is due to the person of the King generally, and not merely to his crown or politic capacity, so as to be released and discharged by his misgovernment of the kingdom. But, notwithstanding this parliamentary recognition of the law, the depositions of Edward II. and of Richard II. were formidable precedents the other way, and though effected by force, as every measure of the kind must

<sup>1</sup> Statutes at large, i. 182, folio.

<sup>2</sup> 1 Edw. III. c. 2.

be, they were conducted with all the forms and solemnities of a judicial proceeding. It was probably in consequence of this inconsistency between the act of Edward III. and the determinations of parliament on these important occasions, that when the question was again started, whether allegiance was due to the King in his politic or in his natural capacity, the opinion of lawyers was divided on the subject.

Soon after the accession of James I. to the English throne a question arose, whether his subjects born in Scotland after that event were entitled to the privileges of natural-born Englishmen. When the case was argued before the House of Lords, it was maintained by Doddridge, solicitor-general, and by Hyde, Brook, Crewe, and Headley, professors of the common law, "that ligeance is tyed to the "kingdome and not to the person of the King," the very doctrine asserted by the Despensers. It was held on the other hand by Chief Justice Popham, Sir Edward Coke, and Chief Baron Fleming, that allegiance is "tyed to the body natural of the "King and not to his body politick," and to this latter opinion all the judges, save one, gave their assent. The case was afterwards tried in the Exchequer chamber, and decided in favour of the post-nati<sup>1</sup>. The decision was conformable to the judgment against the Despensers, but the differences of opinion on the subject show, that the constitutional point it involved was not considered as having been at that time thoroughly settled.

Opinions in  
the case of  
the post-  
nati.

<sup>1</sup> Howell's State Trials, ii. 566-570. Journals of the House of Lords, 24th Feb. 1609.

Some of the arguments urged on this occasion afford a curious illustration of the points of view from which professional lawyers are apt to consider constitutional questions. Ligeance, it was said, must be due to the natural body of the King, for indictments of treason charge the accused with having, contrary to their duty of allegiance, compassed the death of the King, which cannot be understood of his politic body, because his politic body is immortal. Every subject, it was argued, is presumed to have sworn fealty to the King, which must be to his natural person, for in his politic person he is invisible, and being invisible he can receive neither homage nor fealty. The coronation oath, it was added, which he takes at his accession, cannot be administered to him in his politic capacity, for in his politic capacity he never dies, and can never therefore begin to reign<sup>1</sup>. Such were the weighty reasons advanced by the first lawyers of England to convince the hereditary counsellors of the crown, that allegiance is due to the King in his natural as well as in his politic capacity.

Declaration  
of parlia-  
ment in  
1642.

Within a few years after this decision the question was in substance revived between Charles I. and his parliament. It was maintained by the two houses of parliament, and could not be denied by their opponents, that though the King is the fountain of justice and protection, particular acts of justice and protection are not exercised by him in his own person, nor depend on his pleasure, but are exercised by his courts and ministers, who must do their duty therein, though the King in his own

<sup>1</sup> Howell's State Trials, ii. 624.



person should forbid them; and such acts and judgments, it was said, are considered the King's acts and judgments, though done against his will and personal command. To this doctrine, unexceptionable as far as it relates to the courts of law, it was added, that the high court of parliament, meaning by that court the lords and commons, is not only a high court of judicature, with control over grants and patents of the King which they may deem prejudicial to the public, but a council to provide for the necessities, to prevent the imminent dangers and preserve the public peace and safety of the kingdom, and *to declare the King's pleasure in those things that are requisite thereunto*; and that what they do therein, hath the stamp of royal authority, although His Majesty, seduced by evil counsel, do in his own person oppose or interrupt the same, the King's supreme and royal pleasure being exercised and declared in that court after a more eminent and obligatory manner than it can be done by any personal act or resolution of his own<sup>1</sup>.

By this memorable declaration, which was the groundwork of all the subsequent proceedings of the parliament in the civil wars that ensued, it is obvious that the two houses not only separated the politic from the natural capacity of the King, but transferred to themselves the sovereign authority attributed to him by lawyers in his ideal character. They assumed to themselves the supreme

<sup>1</sup> Declaration of the Lords and Commons in Parliament, Rushworth, iv. 551. Commons' Journals, 5th and 6th June, 1642. Lords' Journal, 6th June.



power of the state, retaining nothing of monarchy but the name. What they accomplished was the reverse of what had been attempted by lawyers and churchmen, when they bestowed on the Kings of the Barbarians all the rights and pretensions of the Roman Emperors. In the one case despotism was established under a semblance of law ; in the other, a republic was constituted in fact.

It is curious to observe how, on this occasion, the subtleties of the prerogative lawyers were retorted against themselves. The customary oath of allegiance to the King having been continued to the period of his death, it was contended by the attorney-general of the Commonwealth, in the trial of Duke Hamilton, that this allegiance was due to him in his natural only in consequence of its union with his politic capacity, and so long as they were thus united ; and when separated, that it followed his politic capacity as the more worthy, and though nominally sworn to his person, was in sound construction of law an obligation to his kingdom <sup>1</sup>.

Oaths and  
declara-  
tions ex-  
acted after  
the Resto-  
ration.

At the Restoration, as was naturally to be expected, these pretensions of the two houses were abrogated and annulled ; and the current setting strongly in the opposite direction, laws were passed and declarations enforced, which, if acted on literally, must have converted our limited government into an absolute monarchy. All persons, bound to take the oath of allegiance, were made to swear, that it is not lawful *on any pretence whatever* to take up arms against the King, and were called upon to renounce with abhorrence the traitorous posi-

<sup>1</sup> Howell's State Trials, iv. 1173.

tion, that arms may be taken by his authority against his person or against those who are commissioned by him<sup>1</sup>.

This was the day of triumph for the monarchical theory, which had never before obtained a parliamentary sanction for its extravagances. But in a few years the Revolution followed, and demonstrated the futility of oaths and declarations as securities to a King of England in his endeavours to subvert the fundamental laws of the kingdom. To have retained as part of the oath of allegiance a declaration, in direct violation of which the kingdom had been rescued from arbitrary power, and the nation restored to its ancient rights and liberties, would have been preposterous and indecorous. The declaration required by the militia act and act of uniformity was accordingly abrogated by the first parliament of William and Mary<sup>2</sup>. By some oversight it was left in force under the Corporation Act, and was not finally expunged from our statute book till the accession of the house of Brunswick<sup>3</sup>.

Abrogated  
after the  
Revolution.

By the repeal of the declaration required in the statutes of Charles II., allegiance to the King was placed on the footing in which it had been left by the judges in the time of James I., amended and corrected by the principles acted on at the Revolution. It is due, as has been observed, by every natural-born subject to the person of the King, and

<sup>1</sup> These declarations were required by the Corporation Act, 13 Ca. II. st. 2. c. 1. § 5, 12; by the Militia Act, 13 and 14 Ca. II. c. 2. § 18, 19; and by the Act of Uniformity, 13 and 14 Ca. II. c. 4. § 9.

<sup>2</sup> 1 W. & M. Sess. 1. c. 8. § 11.

<sup>3</sup> 5 Geo. I. c. 6. § 2.

cannot be forfeited, cancelled, or altered but by an act of the legislature. No one born in any part of the King's dominions, and within his protection, can by any act of his own renounce his allegiance<sup>1</sup>. But notwithstanding this unqualified language of our law books, when treating in general terms of allegiance, we are told by the same high authorities, that circumstances may arise, where the King, by inference from his conduct, shall be held to have abdicated his throne and absolved his subjects from their allegiance, and that "resistance to his person "is justifiable, when, by his misgovernment of the "kingdom, the existence of the state is endangered "and the public safety proclaims such resistance "necessary<sup>2</sup>." It becomes us not to state by anticipation what conjunction of circumstances would justify the exercise of this right, or authorise the conclusion, that a King in possession has abdicated his crown, and that the throne is thereby become vacant. In the words of a learned judge, we must leave "to future generations, whenever necessity "and the safety of the whole shall require it, the "exertion of those inherent (though latent) powers "of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish<sup>3</sup>."

Notwithstanding the zeal and success with which the monarchical theory was diffused over Europe by lawyers and churchmen, there have been states where resistance to the King was, in certain cases,

Opinion of  
Blackstone  
on the right  
of resist-  
ance.

<sup>1</sup> Bacon's Abridgment. Prærogative C. 1.

<sup>2</sup> Blackstone, i. 245, 251.

<sup>3</sup> Ibid.



sanctioned by law. In Castille, if the King attempted aught to his own dishonour, or the prejudice of his kingdom, his subjects were entitled and even required by law to resist his will, and remove evil counsellors from his person<sup>1</sup>. In Aragon the nobles enjoyed what was called the privilege of union, by virtue of which they were entitled to confederate against the crown, where any attempt was made by the King to invade or encroach on their liberties. The union was a legal and constitutional association, authorized and regulated by law. It issued its mandates, as a corporation, under a common seal, and could make war on the King without exposing its members to the penalties of treason or rebellion<sup>2</sup>. In England we have one solitary instance of a similar institution. By one of the provisions contained in the Magna Charta of King John, twenty-five barons were to be elected, whose duty it was to take care that the liberties granted by that monarch were observed. If any infringement of those liberties took place, or if any injustice or oppression was committed by the King or his servants, any four of these barons might remonstrate to the King, or in his absence to the justiciary, and if redress was not obtained within forty days, the whole twenty-five, or a majority of them, were empowered to make war on the King till relief was given to their satisfaction. All persons were bound to assist this commission of twenty-five in the discharge of their duty, and the only limit to

States  
where re-  
sistance has  
been au-  
thorized by  
law.

<sup>1</sup> Partidas, part 2. t. 13. l. 25.

<sup>2</sup> Robertson's Introd. to Charles V. note 32d. Hallam's Middle Ages, ii. 68. 8vo.

their hostilities was not to touch the persons of the King and Queen or their issue<sup>1</sup>. This guarantee of our national liberties, which the cruel and perfidious character of John had probably suggested, was omitted in the charter of his son, and therefore forms no part of the Magna Charta of our statute-book.

### JUDICIAL POWER.

Said to  
emanate  
from the  
King.

Justice is said to emanate from the King. All jurisdiction is exercised in his name, and all subordinate magistrates derive their authority from his commission. No action can be raised against him. No one can summon him to appear in a court of justice. Every breach of the peace is a transgression against the King. He alone can prosecute criminals ; and when sentence is passed upon them, he alone can remit the punishment awarded to their guilt. No person can pursue his rights in a court of law without the King's writ ; and no one must presume of his own authority to exact vengeance from those who have wronged him.

These prerogatives follow naturally from the attributes ascribed to the King in his ideal capacity ; but though necessary consequences of that theory, it was some time before the finesse and subtilty of lawyers were able to transfer to the real King all the rights and privileges with which they had invested him in his ideal character (R).

Among the ancient Germans, from whom our Anglo-Saxon forefathers were descended, there were

<sup>1</sup> Fœdera, i. 132.

courts of justice before there were Kings. Capital offences were tried in assemblies of the whole nation. Inferior causes were decided in the places where the contention arose. In every district there was a court of justice, consisting of a chief or president, assisted by all the freemen of the district, or by a certain number selected for the purpose<sup>1</sup>. The freemen decided on the merits of the case brought before them: the chief maintained order, assisted the freemen in their deliberations, and after collecting their opinions, pronounced sentence and saw it carried into execution<sup>2</sup>. There seems to have been no appeal from these tribunals. Every court was supreme as far as its competence went<sup>3</sup>.

Judicial power among the ancient Germans.

After the conquests of the Barbarians and the establishment of royalty among them, considerable changes were introduced in their judiciary system. The King became president of the general assembly of the nation; and when the dispersion of the people over an extensive territory made it inconvenient to collect the whole body of freemen in the same place, ordinary business came gradually to be transacted in a select council of chiefs, of which he was the head. A gradation of tribunals was also established with different degrees of competence; and, in imitation of the Roman law, appeals were introduced

Changes after their establishment in the empire.

<sup>1</sup> Tacitus de Mor. Germ. § 12.

<sup>2</sup> Savigny, l. 171, 179, 198–206, 236–238. Mayer, Instit. Judic. i. 381–395. Théorie des Lois polit. en France, viii. 77–83. Preuves, 25. Bouquet, Droit public de France, 135–165.

<sup>3</sup> Montesquieu, Esp. des Lois, l. 28. ch. 28. The remarks of Montesquieu apply to the administration of justice in France under the second race, but they are equally true of anterior times.



to the King's court from the inferior judicatories (S).

The delegation of authority for particular purposes was a notion familiar to the ancient Germans. Matters of small importance were settled by their chiefs. Affairs of greater magnitude were discussed among the chiefs, and then submitted for decision to the people<sup>1</sup>. When the Salic Franks determined to reduce their ancient customs to writing, they selected four of their rulers to collect, digest, and promulgate them<sup>2</sup>. The earliest laws of the Anglo-Saxons appear to have been a selection of precedents or decisions of their courts of law, revised, confirmed, and committed to writing by the chiefs or elders of the people, in the presence and with the assistance of the King<sup>3</sup>. Every chief among the Germans had a hundred companions or assessors, to assist him with their advice, and support him by their authority in the distribution of justice within his district<sup>4</sup>. When it was found inconvenient to assemble on every trifling occasion all the freemen of the district for the adjustment of differences and administration of justice in their local courts, a plan was adopted by the Franks of nominating a select number of persons, called Scabini, who were bound to attend for the others, without however depriving them of their rights, or preventing them from resuming at pleasure their

<sup>1</sup> Tacit. de Mor. Germ. § 11.

<sup>2</sup> Pact. Leg. Salic. Antiq. Prolog.

<sup>3</sup> Prologues to the Laws of Hlothhære and Eadric, Wihtræd, Ine, and Ælfred.

<sup>4</sup> Tacitus de Mor. Germ. § 12.

judicial functions<sup>1</sup>. A similar institution, though little noticed by historians, is to be found among the Anglo-Saxons. In every *burh* and hundred, a certain number of *witan* were appointed, who were to witness every transaction, and were thereby qualified to judge and decide in every question of property that arose within their district<sup>2</sup>.

Accustomed as the Germanic nations were to the delegation of authority, it is not extraordinary that, when spread over an extensive territory, they intrusted or resigned to a few the power, which had been formerly exercised by the whole body of the people. They were improvident enough to believe, that the authority they gave they could resume at pleasure. They had not yet learned from experience how easily delegated power, granted for a temporary purpose, slides imperceptibly into perpetual, irrevocable, and unlimited dominion.

Soon after the Anglo-Saxons were established in England they substituted permanent Kings for the temporary leaders that had formerly conducted their armies. The Kings thus appointed appear at a very early period to have had a court or council, in which they presided, for administering justice

Judicial  
power  
among the  
Anglo-  
Saxons.

<sup>1</sup> Savigny, i. 172, 217-231.

<sup>2</sup> The fullest account of these elected witnesses is to be found in the Supplement to the laws of Edgar, Anc. LL. and Inst. pp. 116, 117. They are also mentioned in LL. Edw. 5, and frequently alluded to in other places, particularly in the laws of Æthelstan. The connexion between the qualifications required by the Germanic nations for a witness, and those demanded by their laws to enable a freeman to sit and vote in a court of justice, has been pointed out by Savigny (i. 228, 240), and illustrated from the Capitularies.

and ratifying civil transactions between their subjects<sup>1</sup>. Penalties were assigned to them as protectors of the peace and guardians of the laws. The tribunal of the King was the supreme court of judicature, but no one could apply to it for redress till he had been refused justice at home in the hundred and shire to which he belonged<sup>2</sup>. The chiefs, who continued to preside in the inferior tribunals, were styled the King's ealdormen, gerefan, and thegns, and in the contemplation of law, they were held to derive their jurisdiction from him. They still, however, retained some vestiges of their ancient independence. They required no writ from the King for their proceedings<sup>3</sup>. When any affair within the competence of their court was brought before them, they cited the parties to appear, and took cognizance of the case, as they would have done before royalty was established.

Kings assisted in person in the administration of justice.

When an application was made to the King for redress, he either presided in his own court at the trial<sup>4</sup>, or sent his signet to some other tribunal<sup>5</sup>, with directions to hear and decide the cause. It was not till long after the Conquest that the Kings of England ceased, occasionally at least, to attend and take part in the proceedings of their courts of law. In the time of Henry II. the King used to assist in the administration of justice both in the curia regis and in the exchequer<sup>6</sup>. Henry III. is

<sup>1</sup> LL. Hloth. et Eadr. 7, 16. Heming, Text. Roffens., see passim.

<sup>2</sup> LL. Æthelst. i. 3. Edg. ii. 2. Cnut, sec. 17. Will. Conq. 43. Hen. I. xxxiv. 6.

<sup>3</sup> Hickee, Diss. Epist. 2, 8, 48.

<sup>4</sup> Ib. 114.

<sup>5</sup> Ib. 5, 43.

<sup>6</sup> Dialog. de Scacc. l. i. c. 4.



mentioned as having repeatedly sat in Westminster Hall with his judges ; and, on one occasion, when a verdict had been given against him, and the opposite party demanded judgment, he withdrew his suit in open court<sup>1</sup>. We are told that Edward IV. sat in the King's Bench for three days together, in order to see how his laws were executed ; but it is not said that he interfered with the proceedings of the court<sup>2</sup>. It is reported of James I. that he also sat there in person, but that he was told by his judges he could not deliver an opinion<sup>3</sup>. It is now an undisputed principle, that, though the King should be present in a court of justice, he is not empowered to determine any cause or motion but by the mouth of his judges, to whom he has committed his whole judicial authority.

It is a remarkable fact, that the same reign, which, for the last time, exhibited a King of England interposing in his own person in the administration of justice, should also be the last, during which he could be sued like a subject in the courts of law. When he ceased to be amenable, like other magistrates, to civil process in the ordinary course of law, he ceased to exercise in person his judicial functions. The ideal King has continued to be the source of justice ; but since the reign of Henry III. his visible representative on earth has been unable to disturb the fountain or to divert the stream from its proper channel, except through the agency of his judges.

Kings  
could be  
sued in the  
courts of  
justice  
formerly ;

<sup>1</sup> Madox, Exchequer, ch. 3. § 6 ; ch. 20. § 6.

<sup>2</sup> Stow's Chronicle, p. 416. Edition of 1631.

<sup>3</sup> Blackstone, iii. 41.

The ideal King of the law has no superior; he is amenable to no tribunal, and responsible to none but God for his actions. If these attributes had been conveyed entire and without qualification to the real King, he must have been absolute master of the lives and properties of his subjects. But, though stated in law-books to be rights inherent in royalty, they are, in practice, subject to limitations and abatements that render them, if not completely innoxious, at least comparatively harmless. The King of England cannot be sued in a court of law; but if any one has a demand upon him in point of property, the plaintiff has only to petition him for redress in his Courts of Chancery or Exchequer, and on having the attorney-general's fiat, which ought to be given of course, he will have justice administered to him with as much certainty and despatch as if he had brought an action against a subject. The plaintiff indeed will be told, that he receives justice from the King as a matter of grace and not on compulsion, and he must pray for it and accept it on these terms<sup>1</sup>. But while the favour he receives is one that cannot be withheld from him, it is to all essential purposes a right; and the mode of obtaining it can be considered as nothing more than an unmeaning compliment to the legal fiction it disregards and eludes.

The rule that the King of England cannot be sued in a court of law, is founded on his sovereign and transcendent, that is, on his ideal attributes. No suit, say the lawyers, can be brought against him, because no court can have jurisdiction over

but cannot  
now.

Conclu-  
sions from  
this fact.

<sup>1</sup> Blackstone, i. 243; iii. 255.

him. "Who," exclaims Finch, in a burst of loyalty, "shall command the King<sup>1</sup>?" If this reasoning be just, and it seems unanswerable—if it be the want of a coercive jurisdiction over the King that makes it impossible for any suit or action to be brought against him; it follows, that while he was liable to actions like a common person, there must have been some authority in the state, that possessed, or was supposed to possess a legal control over his conduct. It cannot be supposed, that, while the law permitted him to be sued, it held that judgment, if given against him, must remain without effect, unless it was his will and pleasure to submit to the decision of his judges. Accordingly we find, that, in early times, there was a vague notion, even among lawyers, of some legal and constitutional power in the state that had authority to command even the King. Something was still wanting in the theory of our constitution. To reconcile the absolute sovereignty of the ideal King with the limited authority of his representative on earth, it was necessary to exempt the real King from direct control, but to render it impossible for him to execute any of his royal functions without responsible ministers and advisers. By this device the theory of our government was made coherent and complete without danger to the public or injury to the subject.

Before the reign of Edward I. the King of England might have been sued as a common person<sup>2</sup>. In the Year Books of the time of Edward III., it is stated more than once by the judges, that in former

Proof of it.

<sup>1</sup> Blackstone, i. 242.

<sup>2</sup> Comyns' Digest. Action, c. 1.



times the King might be sued like one of the people, and that the practice of applying to him by petition was introduced by an ordinance of Edward I. (T). It is true that Staundforde<sup>1</sup>, who wrote on the prerogative in the reign of Elizabeth, doubts whether a subject could ever have maintained such an action against the King ; because Bracton<sup>2</sup>, who lived in the time of Henry III., states there is no remedy by assize against the King, who has no superior but God ; and he might have added another passage from the same author<sup>3</sup>, where it is expressly said that a writ does not run against the King. But, with submission to Bracton, his authority as a writer of institutes is not to be placed in comparison with the testimony of judges on the bench, one of whom asserts without contradiction, that he has seen a writ beginning with these words : *Præcipe Henry regi Angliæ*.

Bracton was deeply impregnated with the doctrines of the civil law, and has made frequent attempts to transfuse its language and spirit into the law of England. There are passages in his book that place the King above control. There are others where he vainly endeavours to reconcile with the maxims of the imperial law the limited monarchy before his eyes. In the very passage quoted by Staundforde, after laying it down as a principle that the King has no superior but God, that there is no remedy against him by assize, nor in any other way but by petition ; and that if he refuses to correct the wrong he has done, he must be left to the judg-

<sup>1</sup> Exposition of the King's Prerogative, c. 15. f. 42.

<sup>2</sup> L. iv. c. 10. f. 171 b.

<sup>3</sup> Ib. LL. c. 8. § 5. ff 5 b.

ment of heaven ; we find, at the conclusion of the paragraph, this qualifying sentence, unless any one should maintain, that the body of his kingdom and his baronage may and ought to do this in his own court<sup>1</sup>.

In another part of his book, Bracton<sup>2</sup> still more explicitly asserts, that the King has not only a superior in the law, which makes him King, but in his court composed of his earls and barons, who have a right to put a bridle in his mouth, should he be without bridle, that is, without law.

However harsh it may sound to modern ears, the same language is repeated in Fleta<sup>3</sup>. The King, says the author of that treatise, has in the government of his people a superior in the law which made him King, and a superior in his court, that is to say, in his earls and barons.

From these passages in Bracton and Fleta it seems at that time to have been a doctrine admitted even by lawyers, that in matters of justice the King was bound, like other feudal lords, by the decisions of his court, and that even in matters of adminis-

Opinion prevalent that there existed a legal control over the King.

<sup>1</sup> Nisi sit qui dicat, quod universitas regni et baronagium suum hoc facere debeat et possit in curia ipsius regis.

<sup>2</sup> L. ii. c. 16. § 3. f. 34.—Rex autem habet superiorem, Deum scilicet. Item legem, per quam factus est rex. Item curiam suam, videlicet comites, barones, quia comites dicuntur quasi socii regis, et qui habet socium, habet magistrum, et ideo si rex fuerit sine fræno, id est, sine lege, debent ei frænum ponere. No wonder that Selden (Works, iii. 1048, 1821) was shy of quoting these words, considering the times in which he wrote. No one can doubt of "the special reason" that moved him to send his readers to Bracton and to the other authorities he cites rather than repeat their words or give their meaning.

<sup>3</sup> L. i. c. 17. § 9. In populo regendo superiores habet, &c.

tration he was liable to the same control. That such was also the popular belief appears from the account given by Matthew Paris<sup>1</sup> of the festivities on occasion of the marriage of Henry III. with Eleanor of Provence. Enumerating the persons who figured in that ceremony, he tells us that the Earl of Chester walked in the procession with the sword of St. Edward in his hand, in token of his right, as Comes Palatii, to restrain the King, should he fall into any errors in his government.

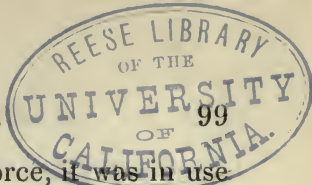
King of  
Spain may  
be sued in  
his own  
courts.

The apparent anomaly of one invested with sovereign authority being liable to have an action brought against him in his own courts, was not confined to England. The King of Spain could be sued by any of his subjects in his courts of law, though it was a fundamental principle in the Spanish as in the English monarchy, that all jurisdiction, civil and criminal, flows from the King, and that all inferior magistrates derive their authority solely from him<sup>2</sup>. Nor was this an antiquated or empty privilege. It was frequently exercised in

<sup>1</sup> In 1236, p. 421. edit. of 1640.

<sup>2</sup> Marina. Ensayo historico critico, § 47. 53. By the fundamental principles, says this author, of the Visigoth Monarchy, the Kings were "unicos señores, jueces natos de todas las causas, a quienes solamente competia la suprema autoridad y jurisdiccion civil y criminal, y de ellos se derivaba como de fuente original a todos los magistrados y ministros subalternos del Regno." Notwithstanding these high-sounding prerogatives, the Kings of Spain, as he informs us, "estan a derecho con todos sus vasallos y todos los pueden pedir in todos sus tribunales por justicia lo que por ella pretenden pertenecerlos—asi piden muchos al rey." This work of Marina was written under Charles IV. as a preface to the new edition of the Partidas published by authority of government, and was printed in 1808.





that country, and, if not still in force, it was in use not many years ago. In Spain, as in other kingdoms of Europe, the government was in theory borrowed from the civil law; but in practice, it was qualified and tempered by the usages and principles of nations that never owned subjection to imperial Rome.

In all crimes and misdemeanors affecting the life or security of the subject, the King of England is considered in law as the injured party, and is therefore invested with the exclusive right of prosecuting the offender<sup>1</sup>: that is to say, the prosecution is instituted at the instance of the King; and, if it be thought necessary or advisable, the person who has actually suffered the injury is brought forward as a witness on the trial. But that this was not the view anciently taken of our criminal jurisprudence is apparent from the existence of prosecutions by *appeal*, at the instance of private parties, known from the earliest times, and, though little practised of late, not abolished by law till a very recent period.

Criminal  
jurispru-  
dence.

An appeal in this sense of the word has been defined by Blackstone<sup>2</sup>, “an accusation of one private subject against another, demanding punishment on account of the particular injury suffered, rather than for the offence against the public.” But, with deference to so great a lawyer, this definition does not convey a perfectly just or complete notion of an appeal. It was the object of that proceeding to combine with satisfaction to the private party, reparation to the public for the offence. In

Prosecu-  
tions by  
appeal.

<sup>1</sup> Blackstone, i. 268; iv. 127. 176.

<sup>2</sup> Ibid. iv. 308.

another passage<sup>1</sup> the same learned judge has more correctly described an appeal as “a private process for the punishment of public crimes ;” and another writer<sup>2</sup> has defined it “the party’s private action, seeking revenge for the injury done to him, and at the same time prosecuting for the crown, in respect of the offence done against the public.” Nothing more, indeed, is necessary to show that an appeal was an action carried on for the public as well as for the private party, than the fact, that when the appeal was tried, justice was satisfied. If the person appealed was put on his trial and acquitted, the plea of *autrefois acquit* was a bar to any further criminal proceeding on the part of the public.

An appeal was commenced by bill or by original writ from chancery, which the officers of the crown could not refuse to any one qualified by law to prosecute. It charged the offender with having wickedly, feloniously, and against the King’s peace, committed the crime imputed to him ; and if found guilty, he suffered the same punishment as if he had been convicted in the ordinary course of law. In two respects an appeal differed from other criminal prosecutions. If a man was appealed by a private person and acquitted, he could not afterwards be indicted by the crown for the same offence ; but if tried by indictment and acquitted, or if tried and found guilty and afterwards pardoned by the King, he might still be appealed by the injured party, and tried a second time on the same charge. It was another peculiarity of appeals, that

<sup>1</sup> Blackstone, iv. 313.

<sup>2</sup> Bacon’s Abridg. Appeal.

if the person accused was found guilty, he could not receive a pardon from the King<sup>1</sup>. It was held, that in trials by indictment the King had a right to pardon, because in the eye of the law he was the injured person ; but that in prosecutions by appeal, he had no right to remit the punishment awarded to the culprit, because in trials by appeal it was the party who had been actually injured that demanded satisfaction for the wrong he had suffered<sup>2</sup>.

Prosecutions by appeal are derived from the most remote antiquity. Till the establishment of civil government, every man is the protector of his rights and the avenger of his wrongs. If he receives an injury or insult, he looks to his own exertions for redress, and assisted by his kindred and allies, to whom he renders a similar service in return, he seeks for vengeance or satisfaction. Among the ancient Germans, if any one was wronged, it was the duty of his relations and friends to resent his injury and take part in his quarrel<sup>3</sup>. His adversary was in the same predicament. However questionable his conduct, he found kinsmen and associates to maintain his cause. The redress which the one party demanded, the other thought it pusillanimous to grant. Violence was resorted to ; retaliation followed ; and a civil or rather domestic war

Criminal  
jurispru-  
dence  
among the  
ancient  
Germans.

<sup>1</sup> Staundforde, Pleas of the Crown, 104.

<sup>2</sup> Blackstone, i. 269 ; iv. 311. 391.

<sup>3</sup> *Suscipere tam inimicitias sui patris, sui propinqui, quam amicitias necesse est.* (Tacit. de Mor. Germ. § 21.) By the laws of the Anglii and Werini (Tit. 6. § 5.) he who was heir to the landed property of another, inherited with it his coat of mail, the duty to avenge his injuries, and the right to receive the legal composition for his death.



ensued, which disturbed the peace of the state, broke its union, and exhausted its strength. To extinguish these feuds, appeals to a common umpire were devised. Courts were established and magistrates appointed to settle the claims and adjust the differences of the hostile factions. A compensation was awarded to the injured party for the loss or injury he had sustained, on the payment of which the offender was relieved from his enmity, and peace for a time restored to the community. Such was the first origin of criminal jurisdiction. Its object was to compose quarrels that would otherwise have been interminable. The complaining party brought his accusation or appeal before the court of the district. The freemen, who were present, heard and decided the cause under the direction of the magistrate or judge. The latter pronounced sentence, and saw it carried into execution.

Pecuniary  
composi-  
tions.

It is probable that compensations for injuries were originally settled by private agreement between the parties; and when courts of law were established, that the amount was determined in every particular case by the tribunal that decided the affair<sup>1</sup>. Custom must gradually have introduced some degree of uniformity in these decisions; and law at length interposed and affixed for every imaginable offence a suitable compensation, which the one party was bound to make and the other to accept as a suffi-

<sup>1</sup> A vestige of this ancient usage is to be found in one of the Anglo-Saxon laws of Æthelbert (65). If a man had his thigh bone broken and was made lame by the injury, friends or arbiters are directed to interpose and assess the damages.

cient atonement for the injury. A penalty to the state was annexed, as a remuneration to the magistrate for his protection, and as a forfeit to the community for the violation of its peace by the offender.

That the primary object of pecuniary compositions for criminal acts was the extinction of feuds, is expressly declared in the laws of Rotharis, King of the Lombards, and clearly evinced by a regulation of his successor Liutprand<sup>1</sup>. If a man was slain, who had no sons, but left daughters whom he had instituted his heirs, Liutprand ordained, that, notwithstanding the disposition the father had made of his property, the composition for his death should go to his male relations, because his daughter could not take off the feud<sup>2</sup>.

Among the Frisians, who of all the northern Barbarians made the slowest advances in criminal law, the magistrate, in cases of homicide, had no right to interpose his authority between the culprit and the kindred of the person slain, unless it was at the request of the latter ; and so late as 1369 he could not proceed against or punish the criminal without their concurrence. The dead body was exhibited to him by the relations, as an evidence of the fact and assertion of their right to satisfaction. It was then interred in their presence, and one of them striking the grave with his sword, thrice exclaimed, Vengeance ! vengeance ! vengeance ! The perpetrator or contriver of the deed was by

<sup>1</sup> Leg. Langob. Rotharis, 45. 74. Liutprand. L. 2. § 7.

<sup>2</sup> Quia filix ejus—non possunt faidam levare.

law left exposed to their feud, unless he could appease their wrath by such atonement as they were willing to accept<sup>1</sup>.

Compensation for bodily injuries and other wrongs not affecting life, was made to the sufferer, or to those in whose tutelage or protection he was placed. If his life was taken away, the composition due for him was divided among his kindred and allies, and part of it was given to his lord. The distribution varied in different countries and at different times. It was not, however, entirely gratuitous. The person entitled to compensation for the loss of his kinsman or ally, was bound in return to assist his kinsman or ally in the discharge of any penalty he incurred; and the portion he had to contribute in the latter case was regulated by the share he had to receive in the former. Such, at least, was the rule among the Anglo-Saxons<sup>2</sup>.

Crimes  
considered  
as offences  
against the  
state,

As civilization improved, better notions of criminal jurisprudence began to prevail. Crimes were considered as offences against the state, and not as mere injuries to individuals. Instead of being content with compensation to the sufferer, it became the chief object of penal law to deter from crime by the dread of punishment. In cases of aggravated guilt or of heinous transgression, pecuniary compensations fell into disuse, and the culprit was made to suffer in his person for the crime he had

<sup>1</sup> LL. Fris. Tit. 2. § 2. with the note annexed to it. Canciani, iii. 6.

<sup>2</sup> Hen. I. lxxv. § 8, 9. Parentes ejus tantum weræ reddant quantum pro ea reciperent, si occideretur—reddant parentes ei quantum de ejus interfectione reciperent.



committed. From the time of Alfred to the reign of Canute, we find a gradual increase in the number of offences, for which no composition in money could be admitted<sup>1</sup>.

When the fiction was adopted of an ideal King, as the representative of the state, offences that disturbed the peace of the community were considered as injuries to the King, and prosecutions for the public were conducted in his name. The ancient process by appeal, however, maintained its ground, and continued to be one of the principal instruments of criminal law. Where it had been before admissible, it was still competent for any one, who thought himself aggrieved, to institute a criminal prosecution against his wrongdoer. Appeals were the subject of many statutes, and occupied a large space in every law book. To remedy an inconvenience arising from the preference given to this mode of trial over indictment, a fundamental principle of law was violated in its favour. It is a maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. The plea of *autrefois acquit* was therefore a general bar to every criminal prosecution. But by a statute of Henry VII. it was enacted, that a former acquittal on an indictment should be no bar to the prosecution of an appeal for homicide<sup>2</sup>.

as offences  
against the  
King,

but appeals  
maintained  
their  
ground.

There were anciently appeals for homicide, mayhem, wounding, assault and battery, false imprisonment.

Different  
sorts of  
appeal.

<sup>1</sup> Ælfr. 4. Æthelst. I. 1. Edm. Sec. 6. Edg. II. 7. Æthelr. I. 1, 2, 4. Cn. Sec. 25, 26, 58, 62, 78, &c.

<sup>2</sup> 3 H. VII. c. 1. Blackstone, iv. 329. Staundforde, P. C. 107.

sonment, rape, burglary, arson, robbery, larceny, and other private crimes, and even for treasons and other offences against the public. In the progress of time some of these appeals have been converted into civil actions; others have been abrogated; and in the late reign<sup>1</sup> the last relic of this ancient procedure was abolished by act of parliament. The crown has now in fact as well as in theory the exclusive privilege of controlling criminal prosecutions.

In appeals the right of pardon, though denied to the King, was enjoyed substantially by the prosecutor. He might grant a release to his antagonist, which was a bar to further proceedings<sup>2</sup>. This right was founded on the principle, that it is allowable for any one to renounce the benefit of a law which he has invoked in his own favour<sup>3</sup>. On the same principle one subject might grant to another a general pardon for all manner of trespasses, felonies, robberies, arsons, and homicides committed in his lordship, as far as related to himself; but it does not appear that such letters of pardon were available in indictments on the part of the crown. It was customary also for private parties, who had grounds of complaint against each other, to grant a mutual release discharging all actions, civil or criminal, on either side<sup>4</sup>.

Letters of  
security.

While pecuniary compositions for homicide and other transgressions were admitted in law, it was usual, after the affair had been compromised, for

<sup>1</sup> By statute, 59 Geo. III. c. 46.

<sup>2</sup> Staundforde, P. C. 59. 98.

<sup>3</sup> Blackstone, iv. 312.

<sup>4</sup> Madox Formulæ, No. 702, 703. 705.

the plaintiff to give a letter of security to the defendant against further proceedings of the judicial authorities, as well as against the enmity of himself and his heirs<sup>1</sup>. But this was not a private transaction, as Dr. Robertson seems to have imagined<sup>2</sup>. The compromise was settled in the public court of the district, and the agreement, as well as the security it recited, was attested by the members of the court. Sometimes the count or graf himself was the person who granted the security, stating that the person, to whom it was given, had paid what the court had awarded<sup>3</sup>.

The proceeding in compositions for homicide in England is minutely explained in the Anglo-Saxon laws<sup>4</sup>. The offender was in the first instance to give assurance to his spokesman, that he was ready to make composition for his guilt, and this assurance the spokesman was to convey to the relations of the person slain, who in their turn were to give assurance to the spokesman, that the slayer might approach them in peace and pledge himself for the payment of the weregild. When this was performed, and the sureties required by law had been produced, the King's peace was established between the parties, which was done by the kindred on both sides swearing on the sword of the umpire, that the King's peace should not be disturbed. Nothing then remained but to make the stipulated payments in the order and at the periods prescribed by law.

Proceeding  
in compositions for  
homicide.

<sup>1</sup> Marculf. Form. ii. § 18. App. § 23. Form. Sirmond. § 39.

<sup>2</sup> Charles Vth. Introd. Note 23. <sup>3</sup> Form. Bignon. § 8.

<sup>4</sup> Anc. LL. and Inst. p. 75. Edm. Sec. 7.



Royal prerogative of mercy.

From the same principle that gave to a subject the right of discharging an appeal he had brought before a court of justice, the lawyers have derived the prerogative of mercy enjoyed by the crown. As representative of the state, the King may frustrate by his pardon an indictment prosecuted in his name. In every crime that affects the public he is the injured person in the eye of the law, and may therefore, it is said, pardon an offence which is held to have been committed against himself<sup>1</sup>.

Exception of impeachment.

Mercy as well as prosecution is now the exclusive attribute of the King. But it was long before the right of pardon was vested either absolutely or solely in the crown. In the time of Edward III. and Richard II. various laws were passed that limited in felonies the royal prerogative of mercy<sup>2</sup>. Pardons for homicide, granted out of parliament, were declared to be void, unless the homicide had been committed in self-defence or by misfortune. It was only by the insertion of clauses of *non obstante* in charters of pardon that these statutes were evaded<sup>3</sup>; and when that fraudulent invention was extinguished by the revolution, it became a doubt whether the crown had a right to pardon murder generally. It was decided, however, by the Court of King's Bench, that as the subject may discharge an appeal, so the King may pardon on an indictment for murder<sup>4</sup>.

<sup>1</sup> Blackstone, i. 268, 269.

<sup>2</sup> 2 Edw. III. c. 2. 4 Edw. III. c. 13. 10 Edw. III. c. 2. 14 Edw. III. c. 15. 27 Edw. III. c. 2. 13 Ric. II. st. 2. c. 1. 16 Ric. II. c. 6.

<sup>3</sup> Staundforde, P. C. 102.

<sup>4</sup> Blackstone, iv. 401.

Until the reign of Henry VIII. the right of pardon, such as it existed by law in England, was not confined to the crown. It extended to Earls Palatine and others possessed of what were called royal franchises. Earls Palatine, says Bracton<sup>1</sup>, have regal jurisdiction in all things, saving the supreme dominion of the King. They had the same right as the King to remit and pardon treasons, murders, and felonies, and to remit outlawries within their jurisdiction; they appointed judges of eyre, assize, and gaol delivery, and justices of the peace; all writs, indictments, and processes were made in their name, to the exclusion of the King's writ and judicial authority; and all offences were said to be committed against the peace of the lord of the franchise as in other places against the peace of the King<sup>2</sup>. In short, they possessed within their franchises every judicial authority of the crown, with the exception of those latent prerogatives inherent in the King in his ideal character. They had the same rights, but not the same theory to support them. They exercised the same powers, but had neither the same means to defend them, nor the same pretences to extend them. What they enjoyed they were held in law to have derived from the crown, and in fulness of time they were compelled to render back to the crown what they were supposed by the law to have received from its bounty. By the act of Henry VIII.<sup>3</sup> the greater part of the privileges that had belonged to the lords palatine were taken from them and annexed to the crown,

Palatine jurisdictions.

<sup>1</sup> L. 3. c. 8. § 4. f. 122 b.

<sup>2</sup> 4 Inst. 205. Blackstone, i. 117.

<sup>3</sup> 27 H. VIII. c. 24.

from which, it is said in the preamble to the act, they had been severed by sundry gifts of the King's most noble progenitors, the Kings of this realm.

That the palatine jurisdictions regulated or abolished by this act had been granted or confirmed by the crown to the ancestors of the persons, who at that time enjoyed them, cannot be denied ; but, that they had been severed from the crown, that there had been a time, when the districts where they were exercised had been administered on the same footing with the other parts of the kingdom, requires more than the assertion of an act of parliament to establish. Several of them existed by prescription, and some of them could be traced back to the Conquest. The Earl of Chester was said to hold his earldom by his sword as the King held the realm of England by his crown. He had his barons and his parliament like the King. In Saxon times the great earls of the Mercians, Northumbrians, and East-Angles possessed what was afterwards called palatine jurisdiction within their governments<sup>1</sup>. They owned the supremacy of the King, and occasionally they were made to bend to his power ; but in general they were little troubled with his interference, and were left to administer with regal authority the districts subject to their command. It was not till the Norman conquest that England was truly consolidated into a single monarchy. The different kingdoms into which it was originally divided, had till then remained in many respects distinct, regulated by different laws, governed by separate assemblies, and administered

<sup>1</sup> Selden's Works, iii. 673.



by local authorities of their own. The Conquest united them into one whole, with the exception of particular districts, that still retained some remnant of their primitive independence; and it was not till the act of Henry, that, with the exception of the duchy of Lancaster, these districts were placed under the same judicial system with the kingdom at large.

In what manner and by what authority the great Saxon earldoms were conferred, we have no certain information. On some occasions they seem to have been given away by the King; in other cases, to have been disposed of by the people, and the choice the people had made, to have been subsequently confirmed by the King. In many of them a tendency to hereditary succession in the same family is discernible; but, as in the descent of the crown, so in the succession to these inferior dignities, collaterals were often preferred to the lineal heir. It is probable, that in England as on the Continent at the same period, there was no settled rule of succession, none at least that was strictly observed in practice.

Appeals to courts of justice had been invented to supersede the use of private war in the prosecution of family feuds and adjustment of private quarrels. But, from the weakness of the government and the turbulence of the people, it was long before that salutary object could be fully attained. The Saxon laws endeavoured to regulate and limit, but made no pretensions to abolish the right of private war. Every man, says Alfred<sup>1</sup>, may fight

Right of  
private war  
among the  
Anglo-  
Saxons.

<sup>1</sup> Ælf. 42. Hen. I. lxxxii. § 3.

for his hlaford without incurring any penalty, if his hlaford be attacked ; and so may a hlaford fight for his man. A man may also fight for his natural-born kinsman, if unjustly attacked, against every one except his hlaford ; for *that* we do not allow. If any person is slain, says a law attributed to the Confessor<sup>1</sup>, compensation must be made to his kindred, *vel guerra eorum portetur*, from which comes the English proverb, “ Buy the spear from “ your side or bear it.” Innumerable passages in the Saxon laws admit the legality of the feud.

In cases of flagrant or aggravated injury vengeance was permitted without waiting for slow redress from law. If any one slew another openly, he was delivered over to the kindred of the person slain<sup>2</sup>. If a man detected any one with his wife or daughter, or with his sister or mother, within closed doors, or under the same coverlet, he might slay him with impunity<sup>3</sup>.

But, though private war in the prosecution of the feud was permitted by the Saxon law, various regulations were made to lessen its frequency and moderate its violence. It was a general rule, that no one, in ordinary cases, could take vengeance into his own hands till he had demanded justice in vain<sup>4</sup>. If he knew where his adversary resided, he was bound to summon him before a court of law<sup>5</sup>. This citation was to be repeated three times in the presence of good witnesses, and notice was to be given to the defendant's lord and to the court where

<sup>1</sup> Conf. 12.

<sup>2</sup> Cn. Sec. 57.

<sup>3</sup> Ælf. 42. Will. Conq. 35. Hen. I. lxxxii. § 8.

<sup>4</sup> In. 9.

<sup>5</sup> Ælf. 42.

he was summoned to appear<sup>1</sup>. If he continued refractory, the prosecutor might then besiege him in his house; but for seven days the besieging party was prohibited from using violence, unless the besieged attempted to break out. At the end of seven days, if the defendant was willing to deliver up himself and his arms, the prosecutor was bound to accept his surrender and to keep him in safe custody for thirty days, giving notice to his friends and relations that it was still in their power to redeem his life. If the prosecutor had not strength sufficient to invest the house, he was to apply to the ealdorman for aid; and if the ealdorman refused him assistance, he was to apply to the King, before he could attack the person of his enemy. If a man met accidentally with his adversary before he was informed of the place of his residence, the latter might offer to surrender and give up his arms, and in that case also the prosecutor was bound to detain him in safe custody for thirty days and give notice of his situation to his friends; but if he refused to yield, the other might attack him on the spot. If violence was used against any one who offered to surrender, compensation was required from the aggressor for all the consequences that followed<sup>2</sup>.

If a man exposed to the feud made his escape into a church that had been consecrated by a Bishop, he could not be taken out by force for seven days, if he was able to endure hunger so long; for no food was to be carried in to him. If he chose to surrender and deliver up his arms, his enemies

<sup>1</sup> Hen. I. lxxxii. § 1.    <sup>2</sup> Ælf. 42. Hen. I. lxxxiii. § 1, 3.



were bound as usual to keep him in custody for thirty days, and give notice to his relations<sup>1</sup>. It is probable that other rights of asylum, though not specially destined for this use, gave to persons exposed to the deadly feud the same protection which they afforded to criminals of a more obnoxious character and less deserving of commiseration<sup>2</sup>.

If any one in prosecution of the feud, or in self-defence, killed another, he was not to aggravate his guilt by the plunder of the person he had slain (U). He was to take nothing that belonged to him, neither his horse, nor his helmet, nor his sword, nor his money. He was to dispose the body decently on the shield the person had worn, if he had one, with his head to the east and his feet to the west, with his lance fixed, his arms around him, and his steed reined. He was then to go to the nearest village, and relate what had happened to the first person he met, in order that an inquisition might be held into the circumstances of the case, with a view to the further proceedings that might be necessary<sup>3</sup>.

To facilitate the extinction of feuds, a singular rule was invented. If a number of persons were slain in a fray between two parties, an account was taken of the slaughter. If it was equal on both sides, neither party had a right to claim compensation or to exact vengeance; but if there was any difference, the party that had suffered most was entitled to satisfaction for the amount of the differ-

<sup>1</sup> Ælf. 5. Hen. I. lxxxiii. § 1.

<sup>2</sup> In. 5. Ælf. 2. Æthelst. III. 6; IV. 4. Edm. Sec. 2 Æthelr. VII. 5.

<sup>3</sup> Hen. I. lxxxiii. § 4, 6.

ence. In this computation a twelfthhyndman was valued at six ceorls or twyhyndmen, because the weregild of a twelfthhyndman was equal to the weregilds of six ceorls<sup>1</sup>.

If any one apprehended a thief, the relations of the culprit were bound to abjure the feud against the captor. The same was required, if a person was slain in attempting to escape from justice, or in circumstances that made him justly liable to suspicion; but if there was any doubt of his guilt, his relations were entitled to prove his innocence<sup>2</sup>.

If any one was accused of a homicide that exposed him to the feud, he might offer himself for legal exculpation from the crime with which he was charged<sup>3</sup>.

A monk was not liable to the feud for offences committed by his kindred. When he professed, he renounced the obligations as well as the privileges of relationship. A secular priest was not exempt from either<sup>4</sup>.

Corresponding attempts were made in other parts of Europe to restrain the excesses and diminish the frequency of feuds. If a man was killed unintentionally, or by accident, a composition was due to the family for the loss they had sustained, but the person who had caused his death was exempt from the feud<sup>5</sup>. If a man was slain in the commission of theft, his relations had no claim to compensation

On the  
Continent.

<sup>1</sup> Anc. LL. and Inst. pp. 75. 80. Hen. I. lxiv. § 2; lxx. § 9.

<sup>2</sup> Wihtr. 25. In. 20, 21. 28. 35. Æthelst. I. 11. Æthelr. II. 9. Conf. 36. Hen. I. lxiv. § 5; lxxiv. § 1, 2.

<sup>3</sup> In. 46. 54. Cn. Eccles. 5.; Sec. 39. Hen. I. lxiv. § 4; lxvi. § 1.

<sup>4</sup> Æthelr. IX. 25. Cn. Eccl. 5.

<sup>5</sup> L. Saxon. t. 12. § 1. L. Langobard. Rotharis. § 389.

for his death, unless they asserted his innocence, and the person who slew him could not establish his guilt<sup>1</sup>. If a man was detected in the night within the close of another, and refusing to surrender, was killed, no composition was due for him<sup>2</sup>. If persons summoned to the army committed depredations in their way, and any of them were slain on that account, no feud could be maintained by their kinsmen or their lord<sup>3</sup>. If a man was put to death by order of the King or general, the person who executed the order was not liable to the feud<sup>4</sup>. If a serf slew a man without the knowledge of his master, the latter was bound to give up the serf, but was himself exempt from the feud<sup>5</sup>.

To check the extension of feuds in cases of homicide, the Burgundian law prohibited the relations of the person slain from taking vengeance on any one but the actual perpetrator of the deed<sup>6</sup>.

To afford a man exposed to the feud some security against the attacks of his enemies, the Saxon<sup>7</sup> law made it a capital offence to kill any man in his own house<sup>8</sup>. Even the Frisic law, which had such respect for the rights of private vengeance, gave protection to those endangered by the feud, at church and at home, in going to and returning from church, and in going to and returning from the public court of the district<sup>9</sup>. The Anglo-Saxon

<sup>1</sup> L. Angl. et Werin. t. 7. § 4.

<sup>2</sup> L. Langob. Rotharis. § 32.      <sup>3</sup> L. Langob. Carol. M. § 34.

<sup>4</sup> L. Bajuv. t. 2. c. 8. § 1. Capitul. 1. 5. § 367.

<sup>5</sup> L. Saxon. t. 2. § 5.

<sup>6</sup> L. Burgund. t. 2. § 3.

<sup>7</sup> That is, the continental Saxon law.—ED.

<sup>8</sup> L. Saxon, t. 3. § 4.

<sup>9</sup> L. Fris. Addit. t. 1. § 1.



law, in like manner, gave assurance of safety in courts of justice, and to all persons going to or returning from them<sup>1</sup>. The Bavarian law went still further, and proclaimed a general peace throughout the province while the courts of justice held their stated meetings<sup>2</sup>.

To prevent the revival of feuds after compositions had been made, it was declared by the Lombards that if any one slew a man, from whom he had accepted legal compensation, he should pay back twice the amount of what he had received<sup>3</sup>.

To accomplish the entire extinction of feuds was the object of many regulations of Charlemagne and his successors. When any one was slain, the Count, in whose district it happened, was directed to compel the offender to pay, and the other party to receive the composition established by law ; and till this was effected, he was enjoined to bind them by sureties to keep the peace. If they were refractory, the Count had instructions to send them before the Emperor ; and if any one, after peace had been made, slew his adversary, he was deprived of the hand that committed the deed, and in addition to the legal composition for the slaughter, he incurred a penalty for his disobedience<sup>4</sup>.

It is needless to add, that the speedy decline and downfall of the Carlovingian monarchy rendered these provisions ineffectual. In spite of the united

<sup>1</sup> Æthelst. I. 20. Cn. Sec. 83.

<sup>2</sup> L. Bajuv. t. 2. c. 15. § 1.

<sup>3</sup> L. Langob. Rotharis. § 74. 143.

<sup>4</sup> Capitul. l. 3. § 4 ; l. 4. § 27 ; l. 5. § 205. 247 ; l. 6. § 271 ; L. Langob. Carol. M. § 19, 20. Ludov. P. § 21.

efforts of law and religion, private war continued to be the scourge of Europe for many centuries. The devices of churchmen and enactments of princes to put it down, have been collected with diligence and enumerated with care by Dr. Robertson<sup>1</sup>. Though slow in their operation and often frustrated by the pride and passions of individuals, they were at length crowned with success. Private war has disappeared, and the only vestige of it that remains is the practice of duelling, which is every where prohibited by law, and every where tolerated and connived at.

Relaxation  
of the bonds  
of kindred.

While the Anglo-Saxons were advancing with the other nations of Europe towards the feudal system, the bonds of relationship were gradually relaxed. As early as the reign of Alfred, if not sooner, the artificial tie, that connected a man with his hlaforð, was esteemed of a higher and more sacred character than the duties he owed to his kindred<sup>2</sup>. In several laws of the same period we find particular cases stated, where the relations of a culprit were exempted from the obligation of making compensation for his misdeeds or of becoming sureties for his conduct<sup>3</sup>. A law was at length passed in the time of Edmund, that if a man committed homicide, he alone should bear the feud, unless his kinsmen by their subsequent conduct made themselves answerable for his transgression. They were at liberty to assist him in compounding for the offence; but if they refused they were not liable to the feud, unless they gave him

<sup>1</sup> Charles V. Introduction, note 21.

<sup>2</sup> Ælfr. 42.

<sup>3</sup> Edw. 9. Jud. Civ. London. xii. 2.

food or protection ; and if one of the adverse faction took vengeance on any person, except the perpetrator of the crime, or one who harboured him, he was declared an enemy of the King and of all the King's friends<sup>1</sup>. From one of the laws published in the name of Henry I.<sup>2</sup>, it appears that among the Anglo-Saxons, as among the Franks, a man might abjure the ties of kindred ; and in that case while he withdrew from the obligations, he renounced all the advantages of that connexion. If any of his relations died, he had no part in the inheritance ; and if any of them was slain, he had no share in the composition paid for the slaughter. When he died, his inheritance went to his children, and failing them to his lord ; and if he was slain, the composition for his death was disposed of in like manner. By the Salic law, as amended by Charlemagne, the composition and inheritance of a man who had renounced his kindred went to the fisc, that is, to the state<sup>3</sup>.

Among the Scandinavians the primitive obligations of kindred continued in force to a much later period than in England. Till the time of Magnus Lagabæter<sup>4</sup>, who flourished in the 13th century, a person guilty of homicide had a right to call on his relations, though no parties to the crime, to contribute their share towards the discharge of the penalty he had incurred. By a constitution of Magnus Lagabæter<sup>5</sup>, this right was abolished, and the cri-

<sup>1</sup> Edm. Sec. 1.

<sup>2</sup> Hen. I. lxxxviii. 13.

<sup>3</sup> L. Salic. Ref. t. 63. § 3.

<sup>4</sup> King of Norway from 1263 to 1280.—Ed.

<sup>5</sup> Gula-things Laug. Preface, 16. The Gula-things laug was



minal made to pay from his own effects the whole of the penalty due for his transgression.

A similar law existed anciently among the Franks. If a man committed homicide and had not wherewithal to pay the legal composition for his offence, he was enabled, by a process called *chrenecruda*, to compel his kinsman to discharge the debt. This law was abrogated in the sixth century by a decree of Childebert<sup>1</sup>, in which it is termed a pernicious device, invented in times of heathenism; but, notwithstanding this repeal, it seems to have been in operation as late as the age of Charlemagne. In the Salic law promulgated by that monarch<sup>2</sup>, it is repeated in nearly the same words as in the ancient code compiled before the introduction of Christianity. It was, however, in the power of any man to relieve himself from this obligation by a solemn renunciation of his kindred in the courts of law<sup>3</sup>.

Relation of  
lord and  
vassal main-  
tained the  
practice of  
private war.

The relaxation of the bonds of kindred had little or no effect in abolishing feuds and private wars. The relation of lord and vassal succeeded to the connexions of kindred with nearly the same duties and obligations on both sides. From Glanville<sup>4</sup> it appears, that in the reign of Henry II., when the

compiled by Magnus, son of Hakon, with advice of the best men of his kingdom. It was read and adopted by the members of the Gula-thing in 1274, and afterwards extended over the whole of Norway with consent of the *things* or legislative assemblies of the different provinces.

<sup>1</sup> Baluz (i. 17.) ascribes this decree to Childebert II., who reigned from 575 to 596. Dom Bouquet (iv. iii.) refers it to Childebert I., son of Clovis, who was King from 511 to 558.

<sup>2</sup> Pact. Leg. Sal. Ant. t. 61. Reform, t. 61.

<sup>3</sup> Pact. Leg. Sal. Ant. t. 63. Reform, t. 63.

<sup>4</sup> Glanville, lib. 9. c. 1.

royal authority in England was still maintained at the height to which it had been raised by the Conquest, the vassals or tenants of a lord were bound to assist him in his private wars. If a man was tenant of more lords than one, he was required to serve in person with his chief lord, and to perform by deputy the service due by his tenure to the others. But, though entitled to the personal service of his tenant in the field, it was doubtful whether the lord could exact from him an aid for carrying on his wars, as he might do for knighting his eldest son or marrying his eldest daughter<sup>1</sup>. The law appears to have continued the same in the time of Bracton. If a tenant had several lords, and quarrels arose among them, he was required to stand by his chief lord in person, and to discharge his services to the others by attorney. Fleta transcribing, as the author of that work usually does, from Bracton, lays down the same rule in nearly the same words. In Britton there is no mention of private war<sup>2</sup>. The practice was going into disuse, and in less than half a century it was adjudged to be illegal. A variety of reasons may be assigned for a change in its consequences so beneficial to the kingdom. The regular distribution of justice in the courts of eyre and assize must have tended to banish this irregular mode of obtaining justice for private wrongs; appeals were open to prosecutors for the redress of their personal injuries; and though the continual complaints of disseisins

<sup>1</sup> Glanville, lib. 9. c. 8.

<sup>2</sup> Bracton, l. 2. c. 35. § 5. f. 79. b. Fleta, l. 3. c. 16. § 16. Britton, ch. 68.

and redisseisins show, that recourse was still had to violence for the recovery of actual or pretended rights, the severe penalties against acts of vengeance and illegal distresses must have had the effect to restrain, if not entirely to extinguish them<sup>1</sup>. In the reign of Edward III. private war was deemed an accroaching of royal power<sup>2</sup>; and by the statute of treasons, the exercise of that ancient right, though it ceased to be treason, was declared to be either felony or trespass as the case might be<sup>3</sup>.

Private war  
in England  
after the  
Conquest.

It is true, there are few memorials of private war on an extensive scale in England after the Conquest, except in times of turbulence and civil commotion. Madox<sup>4</sup> however has published a singular document, containing a formal truce or cessation of hostilities for sixteen days between the Earl Mareschal and the Earl of Gloucester, during which Sir Roger de Clifford was to repair to the Earl of Gloucester at Cirencester, for the purpose of concluding a treaty of peace between those potent earls; and from any thing that appears on the face of the instrument the transaction seems to have been legal and usual. In the reign of Edward I. the Earls of Gloucester and Hereford, after committing sundry acts of violence against each other, applied to the King for justice, and were in consequence inhibited by the King in parliament from further hostilities. Notwithstanding the prohibition, they

<sup>1</sup> See particularly the statute of Merleberge, 52 H. III. c. 1.

<sup>2</sup> Hale, P. C. i. 80.

<sup>3</sup> 25 E. III. st. 5. c. 2. § 13.

<sup>4</sup> Madox, Formulæ, No. 155. Madox conjectures, that the Roger de Clifford mentioned in this deed was the same Roger de Clifford, who lived in the time of John and Henry III. The last Mareschal, Earl of Pembroke, died in 30 H. III.





invaded each other's lands with banners displayed, slew divers persons and carried off much booty. For this contempt they were fined and imprisoned<sup>1</sup>. But from the warfare they had previously carried on with impunity, it does not appear, that their conduct on this occasion would have been punished, if they had not disobeyed the royal commands solemnly announced to them from parliament.

The last instance of a pitched battle between two powerful noblemen in England occurs in the reign of Edward IV. It was fought at Nibley Green in Gloucestershire, on the 10th of August, 1470, between William Lord Berkeley and Thomas Viscount Lisle. Lord Berkeley is said to have brought a thousand men into the field. Lord Lisle and a hundred and fifty men were slain in the action. After the battle was gained, Lord Berkeley proceeded to Lord Lisle's house at Wootton and ransacked it as a place taken in lawful war. The cause of the quarrel was a lawsuit about the succession to the Berkeley estates. Lord Lisle had challenged his competitor to decide the question of right by single combat, or else to bring with him into the field the utmost of his power; to which Lord Berkeley replied, that no such determination of the right to land was used in England, but that he

<sup>1</sup> Rot. Parl. i. 70. 77. The Earl of Gloucester implicated in this transaction was the same Gilbert de Clare, who in the preceding reign had assisted Prince Edward in his escape from the Earl of Leicester, and who had contributed powerfully to the success of the royal cause at the battle of Evesham. He had married a daughter of the King subsequently to the commencement of his private hostilities with the Earl of Hereford, and had by her a son, who was killed at the battle of Bannockburn.

would meet Lord Lisle with his friends and followers at the time and place appointed. The law-suit that gave occasion to this battle lasted a hundred and ninety-two years, and in the course of it Berkeley castle was once taken by surprise and its inmates thrown into prison, and was frequently besieged and defended with effusion of blood. There seems to have been nothing of a political character in this conflict, as both parties were adherents of Edward IV. Neither side was called to account for their proceedings by the government. The widow of Lord Lisle raised an appeal against Lord Berkeley and his brothers for the death of her husband. But the affair was compromised without trial. She accepted a hundred pounds a year in satisfaction for her loss, and renounced her claim to the lands in dispute; and this agreement was ratified in parliament, without any allusion to the battle at Nibley Green or to the death of Lord Lisle<sup>1</sup>.

#### KING SAID TO BE THE FOUNTAIN OF HONOUR.

The King is held in law to be the fountain of honour as well as of justice, and he possesses in fact the sole power of dispensing honours and dignities<sup>2</sup>. This prerogative, like others, he shared for many ages with his subjects. In times of chivalry knighthood was the great personal distinction

<sup>1</sup> Dugdale's Baronage, i. 362. 365. Atkyn's Gloucestershire, 138. Ruder's Gloucestershire, 574. Rymer's Fœdera, xi. 655. Rot. Parl. 12 and 13 E. IV. No. 23.

<sup>2</sup> Blackstone, i. 171.

between one man and another. It was the rank most highly esteemed and most eagerly sought after. To have obtained it was a proof of valour and mark of desert. But this honour, thus coveted by all, it was in the power of any private person, who was himself a knight, to bestow. It was not till a period comparatively modern, that the right to confer the honour of knighthood was vested exclusively in the crown.

### TENURE OF LANDED PROPERTY.

The fiction of law, that the King is the ultimate proprietor of all the lands in his kingdom, has its origin, like his other transcendent prerogatives, in the attributes ascribed to him in his ideal capacity. It is a fundamental maxim and necessary principle of English tenures, “that the King is the universal “lord and original proprietor of all the lands in “his kingdom, and that no man doth or can possess any part of it, but what has mediately or “immediately been derived as a gift from him.” But in justice to modern lawyers it must be remarked, that in laying down this proposition, which supposes that every landed proprietor owed his lands at one time or other to the bounty of the crown, they consider it as a mere fiction of law, which has no foundation in reality or truth<sup>1</sup>. No one will now-a-days tell us with gravity, like Madox, that “King William I. was seised of the whole “kingdom of England in demesne; that he retained part of it in his own seisine; and other

All landed property in England said to be derived originally from the bounty of the King,

a mere fiction of law.

<sup>1</sup> Blackstone, ii. 51.



“part thereof he granted and transferred to others<sup>1</sup>.” If it were necessary to refute an assertion so utterly destitute of truth and probability, it might be asked, how came Duke William by his victory over Harold to acquire the whole land of England in his own seisine? Did he not bind himself by his coronation oath to maintain his subjects in their rights, and govern them by their ancient laws, and was that obligation compatible with the universal confiscation of their estates? Are there not reports of judicial proceedings in his reign, which show that claims to property in land were tried and decided by charters and title deeds derived from the Saxons? Are there not innumerable proofs in Domesday, that lands were held under the Conqueror by the same proprietors who had enjoyed them under the Confessor; and what evidence is there, that in the mean while they had passed into the temporary occupation of the crown? But, suppose the conquest of William to have been as complete as the most extravagant of our prerogative writers have ever imagined; suppose the native English, when they accepted him for their King, to have already forfeited all right to their former possessions; had he not Norman followers, who claimed their share in the fruits of their common victory? Were not many of his companions in the enterprise foreign adventurers, unconnected with him by any ties but those which they had voluntarily contracted? Had not many of them joined in his expedition on the express condition, that, if successful, they should receive their portion

<sup>1</sup> *Baronia Anglica*, b. 1. ch. 2. p. 25.

of the spoil in reward of their services? Were the lands they acquired in virtue of such a compact to be considered as spontaneous gifts of royal munificence? Were they so regarded by the followers of the Conqueror? Two centuries afterwards, when Earl Warrenne was called upon by the commissioners of Edward I. to produce his titles to the lands he inherited from his ancestors, he unsheathed his sword and produced *that* as his title, saying, "My ancestors came in with William the Bastard" and won these lands by the sword, and by the sword I will defend them. William did not conquer for himself alone, nor was it for such an end "that my ancestors lent him their assistance<sup>1</sup>."

Nor is it more credible that, on the first occupation of England by the Saxons, the conquerors transferred the territory they subdued to the general they had appointed to conduct their army. Of all the Teutonic tribes that in the fifth century established themselves on the ruins of the empire, the Saxons had been the least improved or corrupted by former intercourse with the Romans, and had therefore the strongest stamp of the original character of their ancestors. They were the most unlikely, from their previous habits and institutions, to confer unnecessary or extravagant gifts on their chief; or to hasten, like settlers from a civilized state, to parcel out and convert into private property the lands and possessions they had acquired. No people of German origin retained so much of their primitive form of government after they quitted their native forests, and none maintained it with equal

Character  
and govern-  
ment of the  
ancient  
Saxons.

<sup>1</sup> Rapin, i. 360. Tindal's note.

pertinacity and perseverance. Many parts of it resisted the Norman conquest, and there are fragments of it in existence at the present day.

So late as the eighth century the Saxons on the Continent remained strangers to the government of a chief magistrate with the appellation of King. Every district had its ealdorman and every township its *gerefa*. When threatened with war, the ealdormen selected a general in chief to command their army. On the return of peace, his authority ceased, and every one reverted to his former condition<sup>1</sup>. With such notions of equality at home, can it be supposed, that, when successful abroad, they gratuitously conferred on the leader they had voluntarily followed, the whole fruits of the victory they had achieved? Such a sacrifice might have been made to a chief by his immediate companions<sup>2</sup>; but the expeditions of the Germans for conquest or plunder, though conducted by private warriors, were in some degree national undertakings. They were prepared and discussed in a general assembly of the tribe. None were compelled to enlist in the expedition; but all who proffered their services were accepted. When once engaged, it was reckoned infamous for any one to retract. The recreant was pursued by public indignation and set down as a traitor and deserter, unworthy of credit and unfit to be trusted<sup>3</sup>.

It is no less improbable, that bands of adventurers emerging, like the Saxons, from the interior of Germany, where private property in land was

<sup>1</sup> Beda, H. E. l. 5. c. 10.

<sup>2</sup> Tacitus de Mor. Germ. § 14.

<sup>3</sup> Cæsar de Bell. Gall. vi. § 23.



hardly known, should have begun by converting into permanent possessions for individuals, the lands they had acquired by their united efforts.

Among the ancient Germans the territory possessed by the tribe was considered as the property of the community. It was divided into cantons or districts, and these again were subdivided into townships. In every division there was a chief, an assembly of freemen for the regulation of its internal concerns, and a tract of land for the subsistence of its inhabitants. Portions of land were assigned to families and individuals, and after a certain time resumed and distributed to others. In the time of Cæsar these allotments were annual. No one was permitted to retain the same spot of ground for more than a year. Agriculture was little regarded, war and hunting were the favourite occupations of the people, and their food consisted chiefly of milk and cheese, and the flesh of animals<sup>1</sup>. When Tacitus wrote, the lands of the tribe continued still to be divided among its members by public authority. Every township had an allotment proportioned to its population, and this allotment was parcelled out among its inhabitants according to their rank<sup>2</sup>. We are not told whether the grants to individuals were still annual; but from the progress made in agriculture since the time of Cæsar, it is probable that the same lands were occupied by the same persons for a number of years, if not for life. The husbandry of the Germans was still careless and slovenly, and the cultivation of the ground

Land belonged to the community among the ancient Germans.

<sup>1</sup> Cæsar de Bell. Gall. iv. § 1; vi. § 22.

<sup>2</sup> Tacitus de Mor. Germ. § 26.

was still regarded as an ignoble employment, unworthy of warriors. But agriculture had become a greater object of interest and attention in the age of Tacitus. Corn was raised in more abundance; an intoxicating liquor was prepared from it; serfs paid their rent in corn as well as in cattle; and granaries were constructed under ground, to conceal it from hostile devastations and protect it from the inclemency of winter<sup>1</sup>. Land that had been cultivated one year was allowed to lie fallow the next<sup>2</sup>; and, if we may judge from what was afterwards the general practice of Europe, the stubble fields and fallows were open to all the cattle of the village.

Commence-  
ment of pri-  
vate pro-  
perty in  
land.

If the Germans in the age of Tacitus<sup>3</sup> had any patrimonial interest in their lands, it was most probably confined to the spots of ground on which they erected their habitations. A German village consisted of separate houses, built at some distance from one another, and irregularly disposed as inclination or convenience dictated. Every house was surrounded by a vacant space or enclosure, which separated the possession of one man from that of another. The houses, though constructed of rude materials, and deficient in symmetry and convenience, were not destitute of ornament and decoration. They had ceased to be the rude cabins of a migratory people, and were become the residence of men who preferred a fixed dwelling-place to a continual change of habitation. It has been

<sup>1</sup> Tacitus de Mor. Germ. § 14, 15, 16, 23, 25.

<sup>2</sup> Ibid. § 26. Arva per annos mutant.

<sup>3</sup> De Mor. Germ. § 16.

plausibly conjectured, that these houses, with the enclosures attached to them, constituted the first permanent property in land among the Germans ; and from the progress they had made in agriculture since the time of Cæsar, it is probable that the annual partition of land, described by that author, had ceased, and that individuals continued for a series of years, if not for life, in the occupation of the same lands. The territory of the tribe was still the property of the community. But portions of it had been permanently withdrawn from the common stock, and converted into lands of inheritance ; and what was left, though still distributed as before when vacant, instead of changing its owners every year, remained for a longer period in the possession of the same person. We shall afterwards find, that, with modifications arising from the gradual increase of lands possessed by inheritance, this is no unfaithful picture of the state of landed property among the Anglo-Saxons.

The Barbarians, who subverted the Roman empire on the Continent, had been long enough in habits of intercourse with the Provincials to know the value and estimate the advantages of private property in land. The laws of war which at that time prevailed gave them unlimited power over the lives and properties of the vanquished. There is no instance, however, where this right was carried to its full extent. Multitudes were reduced to slavery ; but many retained their personal liberty. The estates of some individuals were subjected to total confiscation ; but in general the Provincials were left in possession of part of their lands. When the conquerors

Partition of lands made by the Barbarians on their first establishment in the empire.



finally settled in the territories they had subdued, the practice, which in most cases they adopted, was to make a partition, with the ancient proprietors, of the lands and chattels possessed by the latter. A Barbarian was quartered on a Roman proprietor, and received from him a certain portion of his land, with the serfs and cattle necessary for its cultivation. To soften this act of spoliation, the intruder was styled the guest of his victim, and some obligations of amity and protection were probably established between them. The distribution appears to have been made by lot ; and as the first division was far from having exhausted the whole territory, fresh adventurers, when they arrived, were provided with possessions in a similar manner from lands that had not yet been divided. Such was the system adopted by the Burgundians in Gaul, by the Visigoths in Spain, and by the Ostrogoths in Italy. The Lombards alone, at their first settlement in Italy, instead of taking from the Roman proprietor a certain portion of his land, exacted from him a corresponding part of its produce.

In what manner the Franks distributed the lands they acquired by the conquest of Gaul, we have no distinct information. The plunder they obtained in the operations of war they divided by lot ; but with respect to land, all we know with certainty is, that the Provincials were not entirely despoiled of their landed property. The existence of Roman proprietors is attested by the Salic law<sup>1</sup> (V).

The lands thus distributed were called alodial. They were transmissible by inheritance, held in

Alodial  
lands.

<sup>1</sup> Pact. Leg. Salic. Ant. t. 44. § 15. Reform. t. 43. § 7.

absolute property, and exempt from all burthens and services to individuals. They are mentioned under various names in the laws and documents of the Barbarians, and seem to have been the universal and immediate result of their conquest and settlement in the empire (W).

It is probable that the shares of different persons were not equal ; that the portion assigned to each was regulated, as it had been in the age of Tacitus<sup>1</sup>, by his rank ; that chiefs, who had numerous companions or retainers attached to their fortune, received larger allotments than others ; and that the King or general of the army had the largest portion of all : but on this subject we have no positive or certain information.

After every warrior, entitled to a separate allotment and desirous of obtaining one, had been provided with an estate suitable to his condition, there remained a large portion of unappropriated land, which, according to the ancient notions of the Germans, belonged to the community. This unappropriated territory was called the land of the fisc or public, and was left, as in Germany, at the disposal of the state. Much of it, with mistaken piety, was lavished on the church. Portions of it were, from time to time, detached from the common stock, and converted into alodial property. Part of it was applied to the maintenance of the government and to the splendour or hospitality of the court. Other parts of it were dealt out in temporary possessions to individuals, by whom it was held, with some rent or service annexed to it, not

Lands of  
the fisc or  
public.

<sup>1</sup> De Mor. Germ. § 26. Agri—quos mox inter se secundum dignationem partiuntur.

Beneficiary  
lands.

in property but in usufruct. Grants of this description were called benefices. The King, from his position and authority in the government, had necessarily a principal share in the distribution of this property, and as representative of the state, it was bestowed in his name, and said to be held of him. From the first origin of benefices they seem to have been granted for life ; but they were often unjustly resumed, and they were at all times liable to forfeiture for misconduct. On the death of the possessor they reverted to the fisc ; but from indulgence or convenience they were frequently continued to his children, and at length they were converted into hereditary possessions. When arrived at this stage of their progress, benefices or feuds, as they began to be called, differed from alodial property in no other respect than in the form of their tenure, and in the incidents, services, and burthens to which they were subject.

The great alodial proprietors followed the example of the fisc in granting benefices to their retainers, which were in like manner gradually transmuted into feuds or hereditary possessions, held by tenure of the lord or original proprietor of the estate.

The stipulations between the fisc or lord and the tenants who held benefices from them, were at first vague and indeterminate ; but by degrees they became more fixed and precise, so that neither party could lawfully exact from the other more than was contained in the compact or agreement entered into between them. The tenants engaged to pay certain rents or perform certain services to their lord ; and the lord in return undertook to protect his tenants



from their enemies, and to maintain them in the possessions he had conferred upon them.

During the ages of anarchy and disorder that followed the conquests of the Barbarians, it was found, that the relation of lord and tenant afforded to the latter greater security for his person and property than he could obtain from the laws or government. To acquire this security with as little sacrifice as possible, the device was invented of alodial proprietors making a surrender of their estates to the crown or to some one able to protect them, on the condition of receiving back their lands as feuds or hereditary benefices, which, though burthened with rent or services, were thereby placed under the safeguard and protection of the lord to whom they had been nominally transferred. In consequence of the extension of this practice, alodial property gradually disappeared, and feudal tenures became nearly universal (X).

Alodial  
lands converted into  
feuds or  
hereditary  
benefices.

The distribution of landed property in England by the Anglo-Saxons appears to have been regulated on the same principles that directed their brethren on the Continent. Part of the lands they acquired was converted into estates of inheritance for individuals ; part remained the property of the public, and was left to the disposal of the state. The former was called *bôcland* ; the latter I apprehend to have been that description of landed property which was known by the name of *folcland*.

Denominations of  
land among  
the Anglo-Saxons.

Folcland, as the word imports, was the land of the folk or people. It was the property of the community. It might be occupied in common, or possessed in severalty ; and, in the latter case, it was

Folcland.

probably parcelled out to individuals in the *folc-gemót* or court of the district, and the grant sanctioned by the freemen who were there present. But, while it continued to be folcland, it could not be alienated in perpetuity; and therefore, on the expiration of the term for which it had been granted, it reverted to the community, and was again distributed by the same authority<sup>1</sup>.

**Bôcland.**

Bôcland was held by book or charter. It was land that had been severed by an act of government from the folcland, and converted into an estate of perpetual inheritance. It might belong to the church, to the King, or to a subject. It might be alienable and devisable at the will of the proprietor. It might be limited in its descent, without any power of alienation in the possessor. It was often granted for a single life or for more lives than one, with remainder in perpetuity to the church. It was forfeited for various delinquencies to the state (Y).

Estates in perpetuity were usually created by charter after the introduction of writing, and on that account bôcland and land of inheritance are often used as synonymous expressions. But at an earlier period they were conferred by the delivery of a staff, a spear, an arrow, a drinking horn, the branch of a tree, or a piece of turf; and when the donation was in favour of the church, these symbolical

<sup>1</sup> Spelman describes folcland as *terra popularis, quæ jure communi possidetur—sine scripto* (Gloss. Folcland). In another place he distinguishes it accurately from bôcland. *Prædia Saxones duplici titulo possidebant: Vel scripti autoritate, quod bocland vocabant—vel populi testimonio, quod folcland dixere* (Ib. Bocland).

representations of the grant were deposited with solemnity on the altar ; nor was this practice entirely laid aside after the introduction of title-deeds. There are instances of it as late as the time of the Conqueror<sup>1</sup>. It is not therefore quite correct to say, that all the lands of the Anglo-Saxons were either folcland or bôcland. When land was granted in perpetuity it ceased to be folcland ; but it could not with propriety be termed bôcland, unless it was conveyed by a written instrument.

Folcland was subject to many burthens and exactions from which bôcland was exempt. The possessors of folcland were bound to assist in the reparation of royal villis and in other public works. They were liable to have travellers and others quartered on them for subsistence. They were required to give hospitality to Kings and great men in their progresses through the country, to furnish them with carriages and relays of horses, and to extend the same assistance to their messengers, followers, and servants, and even to the persons who had charge of their hawks, horses, and hounds. Such at least are the burthens from which lands are liberated, when converted by charter into bôcland.

Folcland exempted from many burthens when converted into bôcland.

Bôcland was liable to none of these exactions. It was released from all services to the public, with the exception of contributing to military expeditions and to the reparation of castles and bridges. These duties or services were comprised in the phrase of *trinoda necessitas*, which were said to be incumbent on all persons, so that none could be

Burthens to which bôcland was subjected.

<sup>1</sup> Hickes, Diss. Epist. 79-85.



excused from them. The church indeed contrived, in some cases, to obtain an exemption from them ; but, in general, its lands, like those of others, were subject to them. Some of the charters, granting to the possessions of the church an exemption from all services whatever, are genuine ; but the greater part of them are forgeries.

Bôcland might, nevertheless, be subjected to the payment of an annual rent to the state by its original charter of creation. We have an instance of this among the deeds of Worcester cathedral collected by Heming. Æthelbald, King of the Mercians, had, it appears, granted to Eanulf, grandfather of Offa, an estate of inheritance, burthened with an annual payment of ale, corn, cattle, and other provisions to a royal vill ; and this estate, with the rent charge attached to it, Offa afterwards gave in remainder to the see of Worcester after his own life and that of his sons<sup>1</sup>.

Folcland  
possessed  
by freemen  
of all ranks  
and condi-  
tions ;

Folcland might be held by freemen of all ranks and conditions. It is a mistake to imagine with Lambard, Spelman, and a host of antiquaries, that it was possessed by the common people only. Still less is Blackstone to be credited, when, trusting to Somner, he tells us it was land held in villenage by people in a state of downright servitude, belonging, both they and their children and effects, to the lord of the soil, like the rest of the cattle or stock upon the land<sup>2</sup>. A deed published by Lye exposes the error of these representations<sup>3</sup>. Alfred,

<sup>1</sup> Heming, 101.

<sup>2</sup> Blackstone, ii. 92.

<sup>3</sup> Lye's Anglo-Saxon Dictionary, Appendix, ii. 2 (Cod. Diplom. ii. 120).

a nobleman of the highest rank, possessed of great estates in bôcland, beseeches King Alfred in his will to continue his folcland to his son Æthelwald ; and if that favour cannot be obtained, he bequeaths in lieu of it to his son, who appears to have been illegitimate, ten hides of bôcland at one place, or seven hides at another. From this document it follows, first, that folcland was held by persons of rank ; secondly, that an estate of folcland was of such value that seven or even ten hides of bôcland were not considered as more than equivalent for it ; and, lastly, that it was a life estate, not devisable by will, but, in the opinion of the testator, at the disposal of the King, when by his own death it was vacated.

by noble-  
men of the  
first rank ;

It appears also from this document, that the same person might hold estates both in bôcland and in folcland. That is to say, he might possess an estate of inheritance, of which he had the complete disposal, unless in so far as it was limited by settlement ; and with it he might possess an estate for life, revertible to the public after his decease. In the latter times of the Anglo-Saxon government, it is probable there were few persons of condition who had not estates of both descriptions. Every one was desirous to have grants of folcland, and to convert as much of it as possible into bôcland. Money was given and favour exhausted for that purpose.

In many Saxon wills we find petitions similar to that of Alfred ; but in none of them that I have seen is the character of the land, which could not be disposed of without consent of the King, de-

scribed with the same precision. In some wills, the testator bequeaths his land as he pleases, without asking leave of any one<sup>1</sup>; in others, he earnestly beseeches the King that his will may stand, and then declares his intentions with respect to the distribution of his property<sup>2</sup>; and in one instance he makes an absolute bequest of the greater part of his lands, but solicits the King's consent to the disposal of a small part of his estate<sup>3</sup>. There can be no doubt that *bôcland* was devisable by will, unless where its descent had been determined by settlement: and a presumption therefore arises, that where the consent of the King was necessary, the land devised was not *bôcland* but *folcland*. If this inference be admitted, the case of Alfred will not be a solitary instance, but common to many of the principal Saxon nobility.

and by  
thegns or  
military  
servants of  
the state.

That *folclands* were assigned to the thegns, or military servants of the state, as the stipend or reward for their services, is clearly indicated in the celebrated letter of Beda to Archbishop Ecgbert<sup>4</sup>. In that performance, which throws so much light on the internal state of Northumberland, the venerable author complains of the improvident grants to monasteries, which had impoverished the government, and left no lands for the soldiers and retainers of the secular authorities, on whom the defence of the country must necessarily depend. He laments

<sup>1</sup> Somner's *Gavelkynd*, 88, 211. Hickes, Pref. xxxii. Diss. Epist. 29, 54, 55, 59. Madox, *Formul.* 395.

<sup>2</sup> Lambard, *Kent*, 540. Hickes, *Diss. Epist.* 54. Gale, i. 457. Lye's *Append.* ii. 1, 5 (*Cod. Diplom.* iii. 361; iv. 299). Heming, 40.

<sup>3</sup> Hickes, *Diss. Epist.* 62.

<sup>4</sup> Smith's *Beda*, 305, 312.



this mistaken prodigality, and expresses his fears that there will be soon a deficiency of military men to repel invasion; no place being left where they can obtain possessions to maintain them suitably to their condition. It is evident from these complaints, that the lands so lavishly bestowed on the church, had been formerly the property of the public and at the disposal of the government. If they had been *bôclands*, it could have made no difference to the state, whether they belonged to the church or to individuals, since in both cases they were beyond its control, and in both cases were subject to the usual obligations of military service. But, if they formed part of the *folcland*, or property of the public, it is easy to conceive how their conversion into *bôcland* must have weakened the state, by lessening the fund out of which its military servants were to be provided.

Some of the monasteries described by Beda were institutions of a singular nature. They had the privileges of ecclesiastical foundations, but were governed by laymen, and were inheritable and devisable like other estates in *bôcland*. They were common in Mercia<sup>1</sup>, as well as in Northumberland; and appear to have been devices of avarice and ambition for obtaining possessions in *bôcland* on false pretences. To this fraudulent subduction of national property from the purposes of military defence to which it had been destined, may in some measure be attributed the success of the Danish

<sup>1</sup> Hickes, *Gram. Anglo-Sax.* 170. Smith's *Beda*, 767, 786. Heming, 218.

invasions, which in the northern and central parts of England had little resistance to encounter.

A charter of the eighth century conveys to the see of Rochester certain lands on the Medway, as they had been formerly possessed by the chiefs and companions of the Kentish Kings<sup>1</sup>. In this instance folcland, which had been appropriated to the military service of the state, appears to have been converted into bôcland and given to the church.

The gesiths, gesithmen, or gesithcundmen, were the military companions or followers of the Anglo-Saxon chiefs and Kings. That this is the true sense of the word, appears from many passages in King Alfred's translation of Beda<sup>2</sup>. Some of these gesiths had lands; others had not<sup>3</sup>. The lands they held were, in some cases at least, not their own<sup>4</sup>. When companions of the King, that is, servants of the state, the lands they possessed were probably folcland. In the latter periods of the Anglo-Saxon history, the appellation of gesith fell into disuse, and appears to have been superseded by that of thegn. The gesiths were the same with the leudes of the Franks and Visigoths, and both were derived from the *comites* of the ancient Germans. It would seem that the *comites* of the King had the designation of thegn, before it was given to the *comites* of inferior chiefs<sup>5</sup>.

Bôcland also might be held by freemen of all ranks and degrees.

Bôcland  
possessed  
by freemen  
of all ranks  
and de-  
grees :

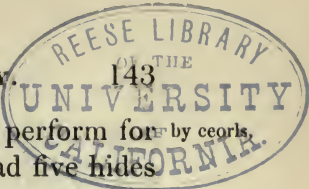
<sup>1</sup> Text. Roffens. 72. Hearne's edition. (Cod. Diplom. i. 135.)

<sup>2</sup> Alfred's Beda, iii. 14, 22; iv. 4, 10, 22; v. 4, 5.

<sup>3</sup> In. 45, 51.

<sup>4</sup> Ib. 63, 64, 65, 66, 68.

<sup>5</sup> Ib. 45.



A ceorl might possess bôcland and perform for <sup>by ceorls,</sup> it military service to the state. If he had five hides of bôcland with the other requisites demanded by law, he was entitled to the privileges of a thegn<sup>1</sup>.

Gesiths might receive grants of bôcland<sup>2</sup>. <sup>by gesiths,</sup>

Thegns might also possess bôcland<sup>3</sup>. But the <sup>by thegns,</sup> estate of a thegn in bôcland must not be confounded with the thegn lands which he held, by a beneficiary tenure, from the King or from a private lord, for military service. Thegn lands from the King or state are repeatedly mentioned in Domesday; and the Saxon laws carefully distinguish the bôcland possessed by a thegn, from the land given him by his hlaford<sup>4</sup>. It is probable that thegn lands were originally granted for life, as beneficiary lands were on the Continent; but before the end of the Saxon period, the possessions given to a man by his hlaford descended, in certain cases, to his children<sup>5</sup>.

The estates of the higher nobility consisted chiefly <sup>by the higher nobility.</sup> of bôcland. Bishops and abbots might have bôcland of their own, in addition to what they held in right of the church.

The Anglo-Saxon Kings had private estates of <sup>Anglo-Saxon Kings possessed of bôcland which did not merge in the crown.</sup> bôcland; and these estates did not merge in the crown, but were devisable by will, gift, or sale, and transmissible by inheritance, in the same manner as bôcland held by a subject.

Offa, King of the Mercians, had 110 cassates of

<sup>1</sup> Anc. LL. and Inst. pp. 80, 81.

<sup>2</sup> Hickee, Gram. Anglo-Sax. 139. Smith's Beda, 786.

<sup>3</sup> Edg. I. 2. Cn. Eccl. 11.

<sup>4</sup> Cn. Sec. 78.

<sup>5</sup> Ib. 79.



land in Kent converted into bôcland for himself and his heirs ; with remainder to the church. These lands did not descend, after the death of his son Ecgferth, to Cœnwulf, his successor in the Mercian throne, but to Cŷnethrith, abbess of Cotham. Other lands, of which he had possessed himself without a legal title, went also to Cŷnethrith, and not to his successors in Mercia<sup>1</sup>.

Cœnwulf of Mercia, after the untimely fate of his son, was succeeded in that kingdom by Ceolwulf and Beornwulf ; but his private property was inherited by his daughter Cwænthrith. In a council held at Clofeshoe under Beornwulf, she is styled the daughter and heiress of Cœnwulf<sup>2</sup>.

We are told that Ethelwulf, King of the West Saxons, made a will after his return from Rome, by which he distributed among his children, kinsmen, and nobles, the whole of his private estate both in land and money<sup>3</sup>.

But the most decisive and circumstantial proof that the Anglo-Saxon Kings had private property in land, and possessed it with the same rights as other persons, is derived from the will of King Alfred, which is still extant<sup>4</sup>. From this document it appears, that Egbert, grandfather of Alfred, had settled his landed property on his male in preference to his female heirs ; that Ethelwulf, father of Alfred, had bequeathed various estates to his younger children, and regulated, in certain contingencies, how they should descend ; that Alfred

<sup>1</sup> Wilkins, Conc. i. 163.

<sup>2</sup> Ib. i. 172, 174.

<sup>3</sup> Asser de Ælfredi Rebus gestis, 4. Flor. Wigorn. in 855.

<sup>4</sup> Published at Oxford in 1788. (Cod. Diplom. ii. 112.)

himself and two of his brothers had acquired landed property, in addition to the inheritance they received from their father; that their rights over their estates were settled and adjudged in the courts of law, as if they had been private individuals; and lastly, that Alfred was empowered to make a new settlement of his lands by a decision of the witan in these words, "It is now all thine own; bequeath it, give it, or sell it to kinsman or stranger, as it pleaseth thee best."

When *bôcland* was created, the proprietor, unless fettered by the original grant, or by a subsequent settlement of the estate, appears to have had an unlimited power to dispose of it as he chose<sup>1</sup>. In the exercise of that power he might transfer it by grant or bequeath it by will, in such quantities, for such periods and on such conditions as he was pleased to appoint. If conveyed by a written instrument, whatever might be the stipulations annexed to the grant, the land was still denominated *bôcland*<sup>2</sup>. It was in consequence of this use of the term that we find estates of very different descriptions classed together under the name of *bôcland*. When once severed from the *folcland* or property of the community, an estate retained the name of *bôcland*, whatever were the burthens and services imposed on it, provided it was alienated by deed. When transferred in a different manner, though held on the same conditions, it seems to have been called *lænland*. This appears from a transaction

*Bôcland at the disposal of the proprietor, unless limited by settlement.*

<sup>1</sup> Somner's *Gavelkynd*, 88, 89.

<sup>2</sup> Heming, 129, 140, 141, 180, 182, 195, 206. Smith's *Beda*, 769, 771.

recorded in the chartulary of Worcester<sup>1</sup>. We are there told, that Archbishop Oswald granted to Ælfsige a tenement in Worcester with the croft attached to it, for three lives, to be held as amply in the form of bôcland as it had been held before in the form of lænland. Lænland might be an estate for life or it might be held at will; and if the possessor was convicted of felony, it reverted to the donor<sup>2</sup> (Z).

Conse-  
quences of  
that power.

Bôcland, when alienated by grant or will, might be free, or in the seignory of some church, manor, or individual<sup>3</sup>. It might be subjected to payments in kind or in money<sup>4</sup>. It might be liable to services, free, servile or mixed<sup>5</sup>. It might be granted on the condition that the possessor discharged the military or other services due by the proprietor to the state<sup>6</sup>. It might be let for annual rent or for the performance of menial offices<sup>7</sup>. It might be

<sup>1</sup> Heming, 158. See also *ib.* 204, 205.

<sup>2</sup> Hickes, *Diss. Ep.* 58, 59. *Text. Roff.* 115, 116. Heming, 94, *MS. Ch. Ch. Cant.*

<sup>3</sup> Hickes, *Diss. Ep.* 62. Heming, 96, 384. Somner, *Gavelkynd*, 205, 206. Smith's *Beda*, 782. Numerous entries in *Domesday* distinguish lands, which in Saxon times must have been bôcland, into free lands and lands in seignory. See i. 72, a 2; 80, a 1; 84, b 2, &c.; and 77, b 22; 120, a 1; 176, b 2, &c.

<sup>4</sup> Hickes, *Diss. Ep.* 10, 55. *Gram. Anglo-Sax.* 140, 142. Lye, *Dict. Anglo-Sax. App.* ii. 1, 2, 3, 5. (*Cod. Diplom.* ii. pp. 120, 354; iii. p. 361; iv. p. 299.) Lambard's *Kent*, 543. Smith's *Beda*, 774. Heming, 118, 144, 191. Somner's *Gavelkynd*, 14, 214. Gale, i. 504, &c.

<sup>5</sup> Heming, 134, 184, 189, 292. *Domesday*, i. 269, b.

<sup>6</sup> Heming, 81, 96, 232, 265. Smith's *Beda*, 773, 778, 779, 780.

<sup>7</sup> Heming, 264, 267, 230.



held for lives or at will<sup>1</sup>; for services certain or indefinite, or with no reservation of services whatever<sup>2</sup>. Tenants of *bôcland* might be persons of the same description with the lowest and most dependent of the occupiers of *folcland*. The only difference between them seems to have been, that the one held their lands directly from the public authorities of the state, while the others held their land of some proprietor, to whom it had been previously granted as a private inheritance. The *vil-  
lein* of latter times and the copyholder of the present day are not derived from the one more than from the other.

*Bôcland* might be forfeited for various offences, and when forfeited, it escheated to the King as representative of the state<sup>3</sup>. Land held of a subject, when forfeited for the same delinquency, escheated to the lord<sup>4</sup>. When *bôcland* was granted on lives, it was usual to insert a clause in the charter, declaring that whatever offence the tenant might commit, his land should revert without forfeiture to the grantor<sup>5</sup>. This precaution, however, was not always successful. The chartulary of Worcester complains, that certain tenants of the see had been

<sup>1</sup> Smith's *Beda*, 770, &c. Lye, App. ii. 1. (Cod. Diplom. iv. p. 299.) Lambard's *Kent*, 544. Madox, *Formul. Diss.* xxi. Somner's *Gavelk.* 14. Heming, *passim*. Hickes, *Diss. Ep.* 62. Gram. 140, 142, 174. Gale, i. 407, 417, 459.

<sup>2</sup> Madox, *Form.* 135. Hickes, Gram. 141. Smith's *Beda*, 779.

<sup>3</sup> Cn. Sec. 13, 78. H. xiii. 12. Text. Roff. 44, 136. Hickes, *Diss. Ep.* 114. Gale, i. 484, 488.

<sup>4</sup> Cn. Sec. 78. Jud. Civ. Lund. I. 1.

<sup>5</sup> Heming, 96, 126, 128, 131, 146, 161, 184, 190, 201, 202, 217, &c. Monast. iii. 37, new ed.

deprived of their lands, and the church defrauded of its reversion in consequence of their failure to discharge, when due, a general tribute imposed on the kingdom<sup>1</sup>.

Folcland was the fund from which bôc-land was created.

From the view that has been taken of the distinction between folcland and bôcland, it follows, that the folcland, or land of the community, like the fisc of the continental nations, was the fund out of which the bôclands, alodial possessions or estates of inheritance were carved. At what time the folcland, or land of the public, began to be converted into bôcland, we are not informed. It was probably soon after the establishment of the Saxons in England ; for, though a more rude and uncultivated people than the nations which had enjoyed greater opportunities of intercourse with the Romans, they must have found private property in land among the Britons, whom they expelled or subdued, and could not long remain insensible to the advantages arising from it. Certain it is, that in one of the earliest charters giving land to the church, it is implied, though not expressly asserted in the grant, that the land contained in the donation had been previously the private property of the donor<sup>2</sup>. But,

<sup>1</sup> Heming, 278.

<sup>2</sup> Ego Hodilredus, parens Sebbi, provincia East Sexanorum, cum ipsius consensu, propria voluntate, sana mente, integroque consilio, tibi Hedeluncæ abbatissæ, ad augmentum monasterii tui, quæ dicitur Beddanham, perpetualiter trado et de meo jure in tuo transcribo terram quæ appellatur Ricingaham, &c. Smith's Beda, 748. Sebbi was one of the Kings of the East Saxons between 665 and 694. The necessity for the King's consent occasions the only doubt in the interpretation of this deed. Hodilred may have had only a life estate in the land, when he transferred

though commenced at an early period, the conversion of folcland into bôcland seems to have been slowly and gradually effected. Every charter creating bôcland is a proof, that the land had formerly been folcland. A charter of Archbishop Wulfred, who died about 830, asserts, in direct terms, that the land, which he gives away, had never been any man's bôcland before it became his, and appeals to general practice, whether a proprietor of bôcland might not sell it or dispose of it as he pleased<sup>1</sup>. In a Charter of Burhred, King of the Mercians, the land he grants to an individual, is said to have been the property of the kingdom before the donation was made<sup>2</sup>.

Folcland being the property of the community, could not be converted into bôcland except by an act of government. In early times this was probably done in the gemôt or public assembly of the tribe, as temporary allotments to individuals were made in the gemôt or assembly of the district. But, when the King came to be considered as the representative of the state, all charters of bôcland ran in his name, and appeared to emanate from his bounty. The power of creating alodial property, by which was meant an estate of inheritance, is enumerated in the *Textus Roffensis* among the prerogatives of the

Folcland  
converted  
into bôc-  
land by  
public  
authority.

it to the monastery, and, with the King's consent, converted it into an estate in perpetuity.

<sup>1</sup> Somner's *Gavelkynd*, 88.

<sup>2</sup> *Ego Burgred, cum consensu et consilio seniorum meorum, libenti animo concedens, donabo aliquam partem agri regni mei.* Smith's *Beda*, 770 (*Cod. Diplom.* ii. p. 81). Burhred was King of the Mercians from 852 to 874.



crown<sup>1</sup>. But, though bôcland could not be created without the authority of the King, it was not in his power to convert folcland into bôcland without the consent of his witan—principes—seniores—optimates—magnates—or other persons, by whatever name they were called, who assisted him in the administration of his kingdom. There is hardly a Saxon charter creating bôcland, which is not said to have been granted by the King with consent and leave of his nobles and great men. If that consent was withheld, his grants were invalid. In the proceedings of a council held at Kingston upon Thames, by Egbert, we are told, that his predecessor, Baldred, King of the Kentishmen, had given to Christ Church, Canterbury, the manor of Mallings in Sussex; but that prince, it is added, having offended his nobles, they refused to ratify his grant, which had therefore remained without effect<sup>2</sup>. In conveyances of bôcland on lives, the consent of the King or of the superior lord is oftentimes mentioned by the proprietor, but is frequently omitted.

When the King became the representative of the state, the folcland, or land of the public, began to be called and considered his property. It was his land in the same sense that the servants of the public were his servants, the laws his laws, and the army his army. In his politic or ideal capacity he was the state, and whatever belonged to the state belonged to him. If folcland was assigned to any

<sup>1</sup> *Istæ sunt consuetudines regum inter Anglos: Carta alodii in æternam hæreditatem.* Text. Roff. cap. 27, p. 44.

<sup>2</sup> Wilkins, Conc. i. 178. Somner's Gavelkynd, 114. Thorne, c. 2218.

one for life or for a shorter term, it was given by his authority and apparently for his service. When it was converted by charter into *bôcland*, or land of inheritance, the deed was executed in his name, and though the grant was of no validity without the concurrence of his *witan*, the donation seemed in form the spontaneous act of his munificence.

While it continued *folcland*, it was subject to payments and other burthens, which were due to him, or to persons who were termed by law his servants.

Appropriations of *folcland* to particular uses.

When bestowed on military men, employed in the national defence, it was called *thegn-land*, and said to be held by his *thegns*. When applied to the service of the person intrusted with the civil administration of the shires and hundreds, it was called *reve-land*, and said to be possessed by his *ealdormen* and *gerefan*. When appropriated to his own subsistence, to the maintenance of his household, and to the splendour of his court, it was said to be held in *demesne* or to be let out to farm. The same lands, it is probable, were constantly or usually destined to the same use and occupied by persons of the same degree (AA).

The appropriation of particular lands to the King's table, and to the expense of his household, most probably took place at a very early period. As representative of the state, one of the duties attached to his station was the exercise of hospitality to those who counselled and assisted him in the administration of his kingdom. It was not unnatural there should be lands specially destined for that purpose, and as these increased in number and

value, it is probable that the dues from other folclands to the state were diminished or less rigidly exacted. A law of Canute<sup>1</sup> illustrates the progress of this change. Desirous, as he says, to lighten the burthens of his people, he directs his gerefan to cultivate his lands with care and from thence to supply him with necessaries, forbidding them to take provisions from any one for his use without the consent of the owner. This is the first allusion I have seen to the right of purveyance, a prerogative that was afterwards so scandalously abused. In its origin it was probably derived from the dues reserved to the state in allotments of folcland to individuals.

From these appropriations of the public lands to the King, as representative of the state, the word folcland fell into disuse, and gave place to the term of Terra Regis or crown land. Antiquaries, inattentive to this change of language, have bewildered themselves among copyholds and commons in search of the folcland of their ancestors.

Sources  
from which  
the Terra  
Regis of  
Domesday  
was de-  
rived.

The Terra Regis of Domesday was derived from a variety of sources. It consisted in part of land that happened at the time of the survey to be in the King's hands by escheats or forfeitures from his Norman followers. It was constituted in part of the lands of Saxon proprietors, which had been confiscated after the Conquest and had not been granted away to subjects. But it was chiefly composed of land that had been possessed by the Confeſſor in demesne, or in farm, or had been held by

<sup>1</sup> Cn. Sec. 70.



his thegns and other servants<sup>1</sup>. Of the last description part was probably the private *bôcland* of the Confessor, which had belonged to him as his private inheritance. But, if we compare the number of manors assigned to him as his *demesne* lands in Domesday with the estates of *bôcland* possessed by Alfred, it seems incredible that the whole should have been his private property. A great part must have been the *folcland* or public property of the state, of which, though the nominal proprietor, he was only the usufructuary possessor, and, with the licence and consent of his *witan*, the distributor on the part of the public. The land which is called *Terra Regis* in the Exchequer Domesday, is termed in the original returns of the Exon Domesday, *demesne* land of the King belonging to the kingdom<sup>2</sup>. In the Exchequer Domesday itself a similar form of expression is to be found. A particular manor is said to have formerly belonged to the kingdom, but to have been since granted to Earl Ralph by the King<sup>3</sup>.

We have seen that the private *bôcland* of the King was distinct from the *folcland* or public property of the state, that it descended to his natural heirs and not to his successors in the kingdom, and that it was devisable by will like the land of a sub-

Private  
lands of  
the King  
merged in  
the crown.

<sup>1</sup> It is difficult to conceive how Lord Lyttleton could have been so careless as to assert that all the *demesne* lands assigned to the crown in Domesday had belonged to it in the time of Edward the Confessor (Henry II. iii. 238. 3d ed.). The slightest examination of Domesday must have shown him the contrary.

<sup>2</sup> *Dominicatus Regis ad regnum pertinens in Devenescira*. Exon Domesday, p. 75.

<sup>3</sup> 2 Domesday, 119 b.

ject. That this distinction should be preserved to a late period among the Anglo-Saxons is not surprising, when it is considered, that in their government royalty was elective, and though their Kings were usually chosen from the same family, that the nearest of blood to the deceased monarch was often passed by or postponed, while a more distant relative was preferred. If the private estate of the King had merged in the crown, it must in such cases have gone to his successor, to the prejudice of his heirs; and to prevent that injustice, it was necessary to keep them separate. Nor was the distinction confined to land. It extended also to personal property. If the King was slain, a heavy composition was exacted for him, one half of which went to his family, and the other half to his people as a compensation for his loss<sup>1</sup>.

But this distinction between the private patrimony of the King and the public property of the state was at length obliterated. When the folclands of the community, that had not been converted into private inheritance, acquired the character and appellation of crown lands, these two species of property were entirely confounded<sup>2</sup>. It became a maxim of English law, that all lands and tenements possessed by the King, belong to him in right of his crown and descend with it to his successor,

<sup>1</sup> Anc. LL. and Inst. p. 79.

<sup>2</sup> To such an extent was this confusion carried, that Spelman, writing in the early part of the 17th century, expresses himself thus: "*Fiscus demum omnes principis facultates respicit, Scaccarium dictus, nulla pene jam nobiscum habita pecuniæ publicæ et privatæ distinctione, cum sit utraque in solius principis arbitrio.*" Glossary, Fiscus.

though he had been seised of them in his private capacity before he was King, and had inherited them from ancestors, who were never invested with the attributes of royalty<sup>1</sup>. By the adoption of this principle the King was restrained from making bequests of landed property by will; but he still retained the power of giving away the lands of the crown in his lifetime<sup>2</sup>, and from erroneous notions of his right to these lands, he was allowed to dispose of them by patent without the advice and consent of his great council. How much that power was abused it is needless to say. The rapacity of favourites and prodigality of the court led parliament frequently to interpose, and at length an effectual, though tardy, remedy for the evil was accomplished by the statute of Queen Anne<sup>3</sup>. The little that remained of the ancient possessions of the state was secured from further dilapidation, and by a singular revolution of policy there was a recurrence in the late reign to the ancient policy of the Anglo-Saxons. The crown lands were virtually restored to the public<sup>4</sup>, while the King obtained the right of acquiring landed property by purchase, and of bequeathing it by will like a private person<sup>5</sup>.

<sup>1</sup> Comyn, Digest. Prærogative, D. 64.

<sup>2</sup> Ibid. D. 88.

<sup>3</sup> 1 Ann. St. 1. c. 7.

<sup>4</sup> By 1 Geo. III. c. 1. and subsequent acts.

<sup>5</sup> By 39 & 40 Geo. III. c. 88.



## CONCLUSION.

If there be truth in the preceding observations, the practice of our constitution has at no time corresponded with the monarchical theory of modern Europe. Every one has read with disgust the indecent attempts of churchmen to impress a character of divinity on Kings, to inculcate on their subjects the obligations of passive obedience and non-resistance as religious duties, to found their title on a delegation from heaven, and with impious flattery to exalt them above the Almighty, by maintaining, that the “most high, sacred, and transcendent” of relations is the “relation between “King and subject<sup>1</sup>.” Every one has heard of the distinction made by judges and lawyers, in the times of the Tudors and Stuarts, between the ordinary and extraordinary or absolute, as they were pleased to call it, prerogative of the crown. Every one knows the abuses introduced into our government under pretence of the sovereign power attributed in law books to the King of England. And every one must admire the resolution and firmness of our ancestors in combating and successfully resisting these pernicious doctrines. When the lords tacked to the Petition of Right a clause subversive of its object; when they proposed as an addition to that celebrated statute a declaration, that it was tendered to his Majesty “with due regard to leave “entire that sovereign power with which he was “intrusted for the protection, safety, and happi-

<sup>1</sup> Brodie, *British Empire*, ii. 136.

“ness of his people;” Sir Thomas Wentworth, afterwards Earl of Strafford, replied, “If we admit of this addition, we shall leave the subject worse than we found him. Let us leave all power to his Majesty to punish malefactors; but these laws<sup>1</sup> are not acquainted with sovereign power.” “Prerogative,” observes Sir Edward Coke, “is part of the law; but sovereign power is no parliamentary word. Magna Charta and all our statutes are absolute, without any saving of sovereign power. Let us take heed what we yield unto. Magna Charta is such a fellow that he will have no sovereign.” “I know how to add sovereign to the King’s person,” exclaimed Mr. Pym, “but not to his power. We cannot *leave* to him a sovereign power; for he was never possessed of it<sup>2</sup>.” “Let us leave to the King,” said Mr. Alford, “what the law gives to him and nothing more<sup>3</sup>.” It is needless to add, that, after many shifts, subterfuges, and menaces, the King was compelled to return his reluctant answer to the Petition of Right, “*Soit droit fait come il est désiré* ;” nor is it necessary to remind our readers, that no sooner was the parliament dissolved than the provisions of the act were disregarded and shamelessly violated by his orders.

In modern times the prerogative of the crown has

<sup>1</sup> i. e. The laws confirmed by the Petition of Right.

<sup>2</sup> I have ventured in the extract from Mr. Pym’s speech to substitute the words *he was* for *we were*. The sense requires it, and Mr. Glanvil’s argument in the name of the commons justifies the alteration (Rushworth, i. 573). The typographical errors in the printed edition of Rushworth are innumerable.

<sup>3</sup> Rushworth, i. 561, 562.

been so strictly defined by law, and since the Revolution there has been fortunately a succession of Princes so little disposed to contend for an illegal extension of its boundaries, that though the old doctrines of absolute sovereignty and transcendent dominion still disfigure our law books, they are little heard of elsewhere. Occasionally however, it happens, that in parliamentary discussions, assertions are hazarded of latent prerogatives in the crown, which are supposed to be inherent in the very nature of sovereignty. That such pretensions are unfounded, it is not difficult to make out. Every government that is not established by military force, or founded on the express consent of the people, must derive its authority from positive law or from long-continued usage. But, where law confers any power, it prescribes and directs the mode of administering the authority it bestows; and what has been given by usage is necessarily regulated by usage in its exercise. A prerogative founded on usage, which cannot be enforced because it has fallen into desuetude, is a contradiction in terms. No one will pretend, that any prerogative of the King of England is founded either on military force or on the express consent of the people. Every prerogative of the crown must, therefore, be derived from statute or from prescription, and in either case there must be a legal and established mode of exercising it. Where no such mode can be pointed out, we may be assured that the prerogative so boldly claimed is derived neither from law nor usage, but founded on a theory of monarchy, imported from abroad, subversive of law



and liberty, and alien to the spirit as well as to the practice of our constitution. In England there are no latent powers of government, but those possessed by the supreme and sovereign authority of the state. The King is our sovereign lord ; but he does not possess the sovereign authority of the commonwealth, which is vested, not in the King singly, but in the King, Lords, and Commons jointly. When we hear of a prerogative inherent in the crown, which the King has no legal means of exercising, we may be certain that it has no existence but in speculative notions of government. Emergencies may arise, where it is necessary for the safety of the state to commit additional powers to the persons intrusted with its defence. But when such cases occur, we are to be guided by considerations of reason and expediency in the powers we confer, and not by vain and empty theories of prerogative, which the very act we are called upon to perform proves to be futile and unfounded.



## AUTHORITIES AND ILLUSTRATIONS.

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(A.)—Page 11.

THERE were Kings in many of the German tribes<sup>1</sup>; but their power was not unlimited or arbitrary<sup>2</sup>. If they directed the councils of their nation, it was auctoritate suadendi magis quam jubendi potestate<sup>3</sup>. The Eburones, a German tribe between the Meuse and the Rhine, were governed by Ambiorix and Cativulcus<sup>4</sup>. Having taken up arms against the Romans, Ambiorix, who had received many favours from Cæsar, stated in excuse for his defection, “sua  
“esse ejusmodi imperia, ut non minus haberet juris  
“in se multitudo quam ipse in multitudinem<sup>5</sup>.” Generally speaking, the name of King was odious to the Germans<sup>6</sup>; and notwithstanding the services Arminius had rendered his countrymen, they put him to death for affecting that dignity<sup>7</sup>. In the tribes governed by Kings there was less freedom than in the other states, and in one of them so great was the jealousy of power, that the people were not intrusted with the possession of arms<sup>8</sup>.

<sup>1</sup> Tacitus de Mor. Germ. 7, 10, 11, 12, 25, &c.

<sup>2</sup> Ib. 7. nec regibus infinita aut libera potestas.

<sup>3</sup> Ib. 11.      <sup>4</sup> Cæsar de Bell. Gall. v. 24.      <sup>5</sup> Ib. v. 27.

<sup>6</sup> Tacitus, Annal. ii. 44. nomen regis invisum.

<sup>7</sup> Ib. ii. 88. regnum affectans.

<sup>8</sup> Tacit. de Mor. Germ. 43, 44.



With the prejudices natural to a Roman, Tacitus expresses himself contemptuously of the tribes subject to Kings, as inferior to the rest of their countrymen<sup>1</sup>. He has neglected to inform us how many of the German communities were under that form of government. Those he mentions are the Marcomanni and Quadi, on the north bank of the Danube; the Gothones, Rugii, and Lemovii near the Baltic; and the Suiones and Sitones in Scandinavia<sup>2</sup>. The younger Pliny adds the Bructeri, in the west of Germany, who had a King imposed on them by the Romans in the time of Trajan<sup>3</sup>. When the Franks compiled their Salic law they were governed, not by Kings, but by chiefs or procures, who seem to have been numerous<sup>4</sup>. Kings of the Franks are mentioned at an earlier period by the Augustan historians; but from the prologue to the Salic law it is probable, that the persons called Kings by the Romans, were merely chiefs or generals of the different tribes that composed the Frank confederation.

(B.)—Page 12.

The form of government in the German tribes has been described by Cæsar and Tacitus. “In pace,” says the former<sup>5</sup>, “nullus est communis magistratus; sed principes regionum et pagorum inter suos jus dicunt controversiasque minuunt.” The account given by Tacitus<sup>6</sup> is more circumstan-

<sup>1</sup> Tacit. de Mor. Germ. 25, 42, 43, 44, 45.

<sup>2</sup> Ib. 42, 43, 44, 45.

<sup>3</sup> Plin. Ep. ii. 7.

<sup>4</sup> Prolog. ad pact. leg. Salic. Antiq.

<sup>5</sup> De Bell. Gall. vi. 23.

<sup>6</sup> De Mor. Germ. 11, 12.

tial. "De minoribus rebus principes consultant,  
 "de majoribus omnes; ita tamen, ut ea quoque quo-  
 "rum penes plebem arbitrium est, apud principes  
 "pertractentur. Considunt armati. Rex vel prin-  
 "ceps, prout ætas cuique, prout nobilitas, prout  
 "decus bellorum, prout facundia est, audiuntur,  
 "auctoritate suadendi magis quam jubendi pote-  
 "state. Si displicuit sententia, fremitu aspernan-  
 "tur; sin placuit, frameas concutiunt. Licet apud  
 "concilium<sup>1</sup> accusare quoque et discrimen capitis  
 "intendere. Eliguntur in iisdem conciliis et prin-  
 "cipes, qui jura per pagos vicosque reddunt. Cen-  
 "teni singulis ex plebe comites, consilium simul et  
 "auctoritas, adsunt."

(C.)—Page 12.

"Quum bellum civitas aut inlatum defendit aut  
 "infert, magistratus, qui in bello præsent, ut vitæ  
 "necisque habeant potestatem, deliguntur<sup>2</sup>." Tacitus<sup>3</sup> confirms this account, "Duces ex virtute su-  
 "munt;" but he represents the authority of these  
 temporary generals as extremely limited: "Duces  
 "exemplo potius quam imperio, si prompti, si con-  
 "spicui, si ante aciem agent, admiratione præsent.  
 "Cæterum neque animadvertere, neque vincere,  
 "ne verberare quidem, nisi sacerdotibus permis-  
 "sum; non quasi in pœnam nec ducis jussu, sed  
 "velut Deo inspirante, quem adesse bellatoribus  
 "credunt." When appointed, the general was ele-

<sup>1</sup> The popular assembly, which Tacitus calls concilium, was termed by the Franks *mallum* or *mahl*; by the Scandinavians, *thing*, and by the Anglo-Saxons, *gemót*.

<sup>2</sup> Cæsar de Bell. Gall. vi. 23.

<sup>3</sup> De Mor. Germ. 7.

vated on a buckler, and exhibited to the surrounding multitude—"impositus scuto, more gentis, et "sustinentium humeris vibratus, dux deligitur<sup>1</sup>." The same ceremony was used in after-times by the Franks, when they made choice of a King; and there is still in England a vestige of this ancient custom, in the practice of *chairing* members of parliament.

At the close of the seventh century, the continental Saxons were still unacquainted with the government of Kings. They were divided into tribes, and their territory into districts<sup>2</sup>, and these last were subdivided into townships<sup>3</sup>. In every district there was a chief or *ealdorman*, and under him, in every township, a *tungerefa* or town-reeve. In time of peace none of the ealdormen had authority over the others; but on the breaking out of a war, they met and determined by lot which of them should have the command of the national forces. While the war lasted, the person thus designated was obeyed as *heretoga* or general of the army. On the return of peace his authority ceased, and all reverted to their former equality<sup>4</sup>.

In conformity to this account we find the leaders who conducted the Jutes and Saxons into Britain in the fifth century, described as heretogan or ealdormen. It was not for some time after their arrival that they assumed the appellation of Kings<sup>5</sup>.

In Northumberland the Angles carried on war with the natives for near a century before they had

<sup>1</sup> Tacit. Hist. iv. 15.

<sup>2</sup> Mægthas—pagi.

<sup>3</sup> Tunscepas—vici.

<sup>4</sup> Bed. Hist. Eccl. v. 10.

<sup>5</sup> Bed. Hist. Eccl. i. 15. Sax. Chron. in 449, 495.



a King to govern them, and in East Anglia and Mercia they were established for many years in the country without any chief magistrate or common head<sup>1</sup>.

About 170 years after the arrival of the West Saxons in England, they revived for a short time the old Germanic constitution of their forefathers. On the death of Cenwealh in 672, we are told by Beda<sup>2</sup>, that the government of the West Saxons was divided among a number of petty Kings, or ealdormen, as they are termed by his translator Alfred. This form of government is said to have lasted about ten years. At the end of that period it was subverted by Ceadwalla, who overcame and expelled these chiefs, and became sole monarch of the West Saxons. In the interval there appeared to have been temporary Kings or generals, created for the conduct of foreign wars<sup>3</sup>.

A similar occurrence took place among the Lombards, soon after their occupation of the north of Italy. On the death of Clephis, their second King, instead of electing another King, they divided the territory they had subdued into thirty-five districts, with a chief or dux, as he is called, presiding over each; and this plan of government is also said to have continued for ten years<sup>4</sup>. "The whole affair," says Savigny<sup>5</sup>, "is commonly said to have been a revolutionary usurpation; but with much more reason, it may

<sup>1</sup> Malmesb. Hunt. Westm.

<sup>2</sup> Hist. Eccl. iv. 12.

<sup>3</sup> Sax. Chron. in 674, 676, 685. Lingard, i. 189, 8vo.

<sup>4</sup> Paul. Diacon. l. 2. c. 32.

<sup>5</sup> Roman Law during the Middle Ages, i. 264.

“ be viewed as a temporary return to the oldest  
“ constitutional practice of the nation.”

(D.)—Page 12.

Soon after the Franks obtained possessions in the country south of the Rhine, they substituted permanent chiefs with the title of King, in place of the ancient leaders of their army, who, like the generals of the Saxons, had probably only a temporary command. This event took place about the beginning of the fifth century. Authors are not agreed as to the name of their first King. Gregory of Tours and his epitomiser Fredegair, make Theodomer the first of their Kings, and say he was the son of Richimer. The *Gesta Francorum* and Prosper Tyro call their first King Faramond. The former pretends he was selected for that dignity by the advice of his father Marchomer. A third chronicle gives to his father the name of Sunno ; and both Sunno and Marchomer are mentioned with Genebald as generals of the Franks, in an expedition they made across the Rhine in the time of Maximus<sup>1</sup>. All agree that the second King of the Franks was called Clodio ; but with respect to the names, succession, and relationship of these princes, the greatest uncertainty prevails till we arrive at Childeric, the father of Clovis, who died in 481. It is even doubtful, whether the whole body of the confederates, united under the name of Franks, were originally the subjects of Clovis. Towards the end of his reign, we hear of petty Kings, his relations, who had separate principalities, and appear in the cha-

<sup>1</sup> Between 383 and 388.

racter of allies rather than of dependents. But, whatever was the condition of these princes, they were extinguished by Clovis, who contrived to destroy them by force or fraud, and to persuade their subjects to acknowledge his authority.

(E.)—Page 13.

The history of the vase at Soissons has been repeatedly told, and must be familiar to the greater part of my readers ; but it illustrates too forcibly the limited authority of the early Kings of the Franks to be entirely omitted. Saint Remy having applied to Clovis for a vase of extraordinary magnitude and beauty, which his soldiers had carried off from the church at Rheims, the King of the Franks promised to restore it ; and when his army met at Soissons to divide their plunder, he entreated them to give him that vase in addition to his proper share of the spoil. The army in general seemed disposed to acquiesce in his request, when a common soldier, striking the vase with his battle-axe, exclaimed, “ You shall have nothing here but what “ you obtain fairly by lot.” Clovis dissembled his resentment at the time ; and though he afterwards took vengeance for the insult, it was by treachery, and on a false pretence, that with his own hand he killed the soldier<sup>1</sup>.

Other proofs are not wanting that Clovis had not power to restore the spoils taken by his soldiers without their consent, as many false and fraudulent claims had been detected<sup>2</sup>.

<sup>1</sup> Gregor. Tur. l. 2. c. 27. Dom Bouquet. ii. 175.

<sup>2</sup> Dom Bouquet. iv. 54.



Nothing indeed is more clear, than that the Kings of the Franks were not possessed of that absolute authority, which the monarchical theory, in the mouths of their churchmen and lawyers, began at a very early period to ascribe to them. Gregory of Tours, in his history of the vase of Soissons, makes the army reply to their King in a strain better suited to Roman provincials than to high-minded and free-born Germans. "Glorious King," they are supposed to say, "let every thing we see before us be thine; are not we ourselves subject to thy dominion? Do what pleases thee best; there is none here to stand against thee or resist thy will<sup>1</sup>." It is whimsical enough that within a few pages of this passage the historian is obliged to confess that after Clovis had become secretly a convert to Christianity, he was afraid openly to renounce his idols, because his subjects were still attached to their ancient worship; and it was not till assured of their conversion, that he ventured to receive the sacred rite of baptism<sup>2</sup>. This hesitation reminds us of Edwin, King of the Northumbrians, who was placed in the same situation, not daring to make public profession of Christianity till he had brought over his thegns and ealdormen to that persuasion<sup>3</sup>.

Beside the national wars, in which the public was concerned, it had been customary for the Germans to engage in private expeditions for con-

<sup>1</sup> *Omnia, gloriose rex, quæ cernimus tua sint; sed ac nos ipsi tuo sumus dominio subjugati; nunc quod tibi bene placitum videtur, facito; nullus enim potestati tuæ resistere valet.*

<sup>2</sup> Greg. Tur. l. 2. c. 31.

<sup>3</sup> Bed. Hist. Eccl. ii. 13.

quest or plunder, under chiefs whom they voluntarily followed. These expeditions were proposed in the general assembly of the tribe by some warrior of established reputation, who offered himself as leader of the enterprise. Those who approved of the project, and had confidence in the leader, tendered their assistance. The multitude applauded their resolution, and if they failed in their engagement, they were regarded as traitors and deserters, and no faith was ever reposed in them afterwards<sup>1</sup>. The adventurers, who subdued Britain, were probably bands of this description; and after the establishment of royalty among the Franks, traces of this ancient custom were long preserved. It was by persuasion, and not by their authority as Kings, that Clovis and his successors engaged their subjects in distant expeditions. To induce his warriors to attack the Visigoths, Clovis urged the scandal of permitting Arians to possess any part of Gaul; and it was to their new-born zeal, as converts to the orthodox faith, as much as to their passion for plunder, that he owed their concurrence in that expedition<sup>2</sup>. To excite his army to invade the Thuringians, Thierry collected them in a body and inflamed their resentment by his recital of the cruelties, which in a former age had been inflicted by that people on their countrymen<sup>3</sup>. Not only were Kings unable to lead their subjects where they pleased, but when the popular voice was raised in favour of any hostile enterprise, they were obliged,

<sup>1</sup> Cæsar de Bell. Gall. vi. 23.

<sup>2</sup> Greg. Tur. ii. 37.

<sup>3</sup> Ibid. iii. 7.

if they could not divert the current, to follow the course it prescribed to them. When Childebert and Clotaire had in vain solicited their brother Thierri to assist them in their invasion of Burgundy, his subjects exclaimed, that if he persisted in his refusal, they would renounce his service and follow his brothers ; and it was only by promising them the spoils of Auvergne, that Thierri prevailed on them to change their purpose and accompany him into that province<sup>1</sup>. When Clotaire was inclined to accept the terms of peace offered him by the Saxons, his army mutinied, broke into his tent and threatened to murder him unless he went on with the war<sup>2</sup>. Even under the Carlovingian princes, the advice of the army was often taken and its consent obtained before embarking in foreign wars<sup>3</sup>. On the other hand, when Pepin, father of Charlemagne, prepared an expedition against the Lombards, the chiefs with whom he consulted threatened to abandon him and return home, if he persisted in the enterprise<sup>4</sup>.

The monarchical theory ascribes exclusively to the King all the executive functions of the government. Among us, from early times, it has been the practice of the King to consult with his subjects in matters of state and internal administration, as well as to obtain their consent for the enactment of laws and imposition of taxes. The same usage appears to have existed among the Franks under the first two races of their Kings. Many

<sup>1</sup> Greg. Tur. iii. 11.

<sup>2</sup> Ibid. iv. 15.

<sup>3</sup> Dom Bouquet. v. 35, 37, 45, 47.

<sup>4</sup> Eginhard, vita Karoli M. 36.



similar facts have been collected and published in an excellent work called *Théorie des Lois politiques de France* (tome iiime, Preuves 113, 115; tome vime, Preuves 158, 165). It is a practice obviously derived from the ancient constitution of the Germanic tribes.

(F.)—Page 15.

It is not surprising that the Kings of the Barbarians were intoxicated by the strains of adulation poured into their ears by their clergy. Some notion may be formed of the excess of this baseness from a speech of Gregory of Tours to Chilperic, which that historian has recorded of himself. “If any of us, O King! transgress the boundaries of justice, thou art at hand to correct us; but if thou shouldst exceed them, who is to reprehend thee? We address thee, and if it please thee, thou listenest to us; but if it please thee not, who is to condemn thee, save Him, who has proclaimed himself justice<sup>1</sup>?” No wonder that Levesque, in commenting on this passage, should have stigmatised the nation, where such language was heard, as a people “*abruti dans les fers.*”

In justice, however, to churchmen, it must be owned, that some of them held a different language. Hincmar, archbishop of Rheims, who lived under Ludovicus Pius and his sons, lays it down as a principle, that Kings are bound to observe the laws that had been made by their predecessors with consent of their subjects; and after stating it to be the opinion of some, that princes are subject to none

<sup>1</sup> Gregor. Tur. l. 5. c. 19. Qui se pronuntiavit esse justitiam.

but God, who placed them by hereditary descent where they are, he adds, that this is not the doctrine of a Catholic Christian, but of a blasphemous and diabolical spirit<sup>1</sup>. When Hincmar wrote, it is true, the bishops had already claimed and repeatedly exercised the right of deposing Kings for their misconduct.

(G.)—Page 15.

The resemblance between the monarchical theory of modern Europe and the principles of government established in imperial Rome, has not escaped the observation of Blackstone<sup>2</sup>. After describing what he regards the peculiar advantages of monarchy in giving “ unanimity, strength, and despatch ” to the administration of public affairs, without considering that, in practice, it is not the King alone, but the King with the advice and concurrence of his confidential servants, that conducts the government of England, he concludes with the following passage :  
 “ The King of England is therefore not only the  
 “ chief, but properly the sole, magistrate of the  
 “ nation ; all others acting by commission from,  
 “ and in due subordination to, him : in like manner  
 “ as, upon the great revolution in the Roman state,  
 “ all the powers of the ancient magistracy of the  
 “ commonwealth were concentrated in the new emperor ; so that, as Gravina expresses it, in ejus  
 “ unius persona veteris reipublicæ vis atque majestas per cumulas magistratuum potestates ex-  
 “ primebatur.” If Blackstone’s subject had led him

<sup>1</sup> Montlosier, *Monarchie Française*, i. 406.

<sup>2</sup> Blackstone, i. 250.

to investigate the origin of the monarchical theory, it is clear from this passage that he would have arrived at the conclusion expressed in the text.

Montlosier, in his very acute and ingenious, though prejudiced, work on the French monarchy, has proposed a similar theory with respect to the origin of the monarchical system in Europe. The celebrated maxim of the French lawyers, "qui veut "le roi, si veut la loi," he refers to its proper source in the civil law, and contrasts it with the declaration of Charles the Bald, "lex fit consensu "populi et constitutione regis<sup>1</sup>." As an illustration of the ancient French law he cites the following passage from the Establishments of St. Lewis: "Bers si a toutes justices en sa terre. Ne li-roi ne "püet mettre ban en la terre au baron, sans son "assentement, ni li bers ne püet mettre ban en la "terre au vavasor;" and sets in opposition to it the commentary of Beaumanoir, who as a lawyer was scandalised at such an admission on the part of the King, "Voire est que le roi est Souverain "pardessus tout, et a de son droit le général garde "du royaume, par quoi il peut faire tel établisse- "ment comme il lui plaît pour le commun profit, "et chi il établit i doit être tenu<sup>2</sup>." In the words of St. Lewis we have the real King, limited, as he then was, by usage. In the commentary of Beaumanoir we have the ideal King, with the prerogatives ascribed to him by his lawyers.

The same author refers to the memoirs of Lewis XIV. for the impression made on Kings by the

<sup>1</sup> Monarchie Française, i. 179, 310.

<sup>2</sup> Ibid. 308, 309. Établissements de Saint Louis, l. 1. ch. 24.



monarchical theories in which they are educated. Instructing his son, the expectant heir of his crown, in the rights and duties attached to his station, that monarch expresses himself as follows : “ Vous devez donc premièrement être persuadé, que les rois sont seigneurs absolus et ont naturellement la possession pleine et libre de tous les biens qui sont possédés, aussi bien par les gens de l’église que par les séculiers<sup>1</sup>. ” In other passages the King gravely assures his son, “ que les rois sont nés pour posséder tout et commander à tout<sup>2</sup>, ” and that they are “ les arbitres souverains de la fortune et de la conduite des hommes<sup>3</sup>. ” Adverting, as he frequently does, to their divine original, he boasts “ que le ciel les a fait dépositaires souverains de la fortune publique<sup>4</sup>; ” and insisting on the wickedness of resisting their commands, he observes, “ Celui qui a donné des rois aux hommes a voulu qu’on les respectât comme ses lieutenans ; se réservant à lui seul le droit d’examiner leur conduite. Sa volonté est que quiconque est né sujet, obéisse sans discernement<sup>5</sup>. ” Our James I. was content to “ adorn his person with some sparkles of divinity ; ” but, in what relates to the true discernment of character and to the judicious distribution of places and favours, Lewis XIV. claims for himself and brethren the omniscience as well as the authority of the Almighty. The pretension is so extraordinary that it deserves to be given in his own words : “ Il en est sans doute de

<sup>1</sup> Mémoires de Louis XIV., 1re Partie, 156.

<sup>2</sup> Ibid. 2de Partie, 10.

<sup>3</sup> Ibid. ibid. 57.

<sup>4</sup> Ibid. 1re Partie, 67, 75.

<sup>5</sup> Ibid. 2de Partie, 55.

“certaines (fonctions de la royauté) où tenant,  
 “pour ainsi dire, la place de Dieu, nous semblons  
 “être participans de sa connaissance aussi bien  
 “que de son autorité; comme, par exemple, en ce  
 “qui regarde le discernement des esprits, le partage des emplois, et la distribution des grâces<sup>1</sup>.”

Extravagant as these doctrines must appear to an Englishman of the present day, let it be remembered that they were openly professed under the two first princes of the house of Stuart, applauded by their bishops, and inculcated by their chaplains and divines.

(H.)—Page 16.

Heretoga signifies the leader of an army, and is derived from *here*, army, and *teon*, to lead.

The modern word King is a contraction of the Anglo-Saxon *cyning*. Some have derived it from a verb that signifies to know, and to can or be able, Kings being wise and powerful. But a more probable etymology is suggested by Lye in his edition of Junius, viz. that *cyning* is derived from *cyn*, which means kindred, family, tribe, nation. In confirmation of this origin of the word it is to be observed, that in Mæsogothic, *thiuda* means people, and *thiudans*, king; that in Norway *fylkir* was the word used to denote a petty or provincial King, and *fólk* to express the inhabitants of the district; that among the ancient Scandinavians *dróttinn* was the title of their Kings, and *drótt* their word for people. The Anglo-Saxons had also the word *drihten* for supreme lord, and *driht* for people,

<sup>1</sup> Mémoires de Louis XIV., 2de Partie, 16, 17.

and sometimes they called their King *cyne-hlaford* or lord of the nation, distinguishing him thus from inferior *hlaforðs*, who were the lords of none but their immediate followers or companions.

But the word *cyning* in Anglo-Saxon, from its structure, is manifestly a patronymic ; like *Æscing*, son of *Æsc* ; *Uffing*, son of *Uffa* ; *Ælling*, son of *Ælle* ; *Cerðicing*, son of *Cerðic* ; *Iding*, son of *Ida* ; *Cryðing*, son of *Cryða* ; *Ætheling*, son of the *Æthel* or noble. According to this analogy, the person who had the title of *cyning* given to him, was considered as one standing in the same relation to the tribe that a man does to his father or to the founder of his race. In other words, the *cyning* was considered as the son or child of the nation, a more appropriate designation, perhaps, than the modern phrase of Father of his people.

(I.)—Page 40.

The word *ætheling* meant originally a person of noble birth, the child of an *æthel* or noble, and was used in that sense by the Lombards, Bavarians, Anglii and Werini, and by the continental Saxons as late as the ninth century<sup>1</sup>. Among the Anglo-Saxons it seems to have been restricted to persons of royal descent, including, however, in that description the families of the petty Kings as well as of the chief Kings of the nation. Noble families are distinguished in the Kentish laws by the appellation of *eorlcund*, and the descendants of those who had raised themselves above the rank of *ceorls*

<sup>1</sup> Paul. Diacon. l. 1. c. 21. Canciani, ii. 293 ; iii. 31. Nithard, l. 4. c. 2. apud Dom Bouquet. vii. 29.



were said to be of the *gesithcund* race, from the word *gesith*, which meant the companion of a chief<sup>1</sup>.

(K.)—Page 40, *note* <sup>2</sup>.

Neither in Beda, nor in Malmesbury or Westminster, who also relate the fact, is there any mention of the sum paid. Beda calls it *debita multa*, which implies it was the legal composition. The payment made by the Kentishmen for the slaughter of Mul is variously given in the different MSS. of the Saxon Chronicle. In two of the oldest and best (as I am assured by the learned editor of the new edition of that valuable work now printing under the auspices of government<sup>2</sup>), it is described as the composition due for thirty men; in two others it is stated to have been 30,000, omitting the denomination of money in which it was estimated; and in one it is said to have been 30,000 pounds. Discarding the last as an obvious blunder, it becomes a question, whether the sum produced by the insertion of *sceatta* after 30,000, or that produced by the insertion of *thrýmsa* will best agree with the composition for thirty men. Assuming these men to be *twýhýnd* men, their united *weregilds* must have been 6000 shillings or 30,000 pennies, which make  $120\frac{1}{2}$  pounds. Thirty thousand *sceatts* make exactly 120 pounds, or the simple *weregild* of a King by Mercian law; thirty thousand *thrýmsas* make 375 pounds, or the entire *weregild* of a King by Northern or Middle Angle

<sup>1</sup> Anc. LL. and Inst. pp. 11, 80.

<sup>2</sup> It has recently been published.—ED.

law ; and, as the former agrees best with the composition for thirty men, it is probable that sceatta is the word omitted in the MSS., which ought to be restored.

(L.)—Page 42.

The changes that insensibly take place in the notions and sentiments of mankind, when viewed at long intervals of time, are not devoid of curiosity or unworthy of observation. The law of treason was originally founded on the allegiance, fealty or mutual connexion between a chief or lord and his men or companions, and when first introduced, it gave no greater protection to the King than to the meanest chief in his dominions. “Majesty,” as N. Bacon remarks, “had not then arrived at its “full growth.” So much are times altered, that a learned and distinguished judge, in his discourse on petty treason, has thought it necessary to inform his readers, that “in the consideration of law “there is a greater degree of malignity in petit “treason than in murder, arising from that degree “of allegiance, *however low*, which the murderer “owed to the deceased<sup>1</sup>.” From this passage it appears, that the species of allegiance which gave rise to the law of treason is now esteemed so low, that something like an apology is made for taking it at all into consideration.

(M.)—Page 43, *note* <sup>2</sup>.

The passage from Bracton referred to by Sir Edward Coke, relates to accidental homicide. After

<sup>1</sup> Foster, Crown Law, 327.

stating various cases where one person might cause the death of another without any felonious intent, and where he ought therefore to be acquitted, *quia crimen non contrahitur nisi voluntas nocendi intercedit*, and adducing infants and madmen as instances of persons incapable of committing crimes; Bracton proceeds to observe, in *maleficiis autem spectatur voluntas, et non exitus*—"for in crimes "we are to consider the intention, and not the mere "fact;" and then he goes on to state, *et nihil interest, occidat quis, an causam mortis præbeat*—"and it makes no difference whether the man commits the homicide himself, or supplies the means "of effecting it."

The last words have misled Sir Edward Coke, who seems to have understood from them, that in the opinion of Bracton it made no difference whether the crime was actually perpetrated, or attempted by some overt act, though not accomplished. In *Fleta*<sup>1</sup>, where the same passage is given in nearly the words of Bracton, the meaning is clear from a different collocation of the sentence. As corrected by his editor, the passage is as follows: *In maleficiis autem spectari debet voluntas, et non exitus. Et nihil interest an occidat quis, an causam mortis præbeat; voluntas enim et propositum distinguit maleficia.*

(N.)—Page 58.

Ammianus Marcellinus<sup>2</sup> relates of a King of the Alamanni, that, being reduced to straits and com-

<sup>1</sup> Foster, Crown Law, l. 1. c. 31. § 4.

<sup>2</sup> Lib. 16. c. 12.



pelled to surrender at discretion, his companions, to the number of two hundred, with three of his intimate friends, voluntarily delivered themselves up as prisoners, thinking it disgraceful not to share his fortunes.

Another illustration of the attachment of companions to their chief, is afforded by a tragical story told in the early part of the Saxon Chronicle <sup>1</sup>.

Cynewulf, King of the West Saxons, having gone with a small retinue to Merton, was beset in the house where he lodged by his enemies, and having imprudently sallied forth before his friends had assembled, he was slain on the spot. On his thegns coming up, the ætheling Cyneheard, who had conducted the enterprise, offered to spare their lives and take them into his service ; but they spurned at the proposal, and, attacking him, were all slain, except one, who was severely wounded. Next day a large body of the King's friends, roused by the news of his slaughter, arrived at the place with a determination to avenge his death. The ætheling promised them lands and money, if they would assist in raising him to the throne, and reminded them that many of their kinsmen were on his side, who would not desert him. They replied, that no kinsman was dearer to them than their hlaforð, and that they would never become the followers of his assassin ; and turning to their kinsmen, who were with the ætheling, they offered to let them depart in safety if they would abandon him ; to which the others replied, that the same offer had been made to the companions of the King and had been re-

<sup>1</sup> In 755.



jected by them, and for their part they cared as little for their lives as the companions of the King had done. A battle ensued, in which the ætheling was slain with all his followers, except one who was godson to ealdorman Osric, the commander of the opposite party.

In this narrative it is worthy of remark, that the companions of the ætheling considered themselves bound to their hlaford by ties equally strong and sacred as those which subsisted between the companions of the King and their chief. It was not as their King but as their hlaford that the latter refused to accept satisfaction for his death; and both parties in their turn attempted in vain to loosen the firmness and relax the sacredness of this connexion.

(O.)—Page 61.

This inference may be fairly drawn from the oath of a man to his hlaford, preserved in the Anglo-Saxon law<sup>1</sup>. The relation established by that oath is personal and conditional, without any reference to land as the bond of connexion between the parties; and with the substitution of the word hlaford for that of chief, it most probably expresses the mutual obligations between a German chief and his companions. An ancient law of the Visigoths declares, that if any one has given arms or other things to a person under his protection (in *patrocinio constitutus*), it shall not be in his power to take back the gift. If the dependent wishes to change his patron, he is at liberty, says the law,

<sup>1</sup> Anc. LL. and Inst. p. 76.

to follow his inclination ; for every freeman has an inherent right to attach himself (*se commendare*) to whom he pleases. But in that case he must give back to his patron all the gifts he had received from him<sup>1</sup>. If we substitute for patron the word chief, and for *commendatus* the word companion, we have probably in this enactment a vestige of the ancient customary law of the Germans. Other regulations follow, some of which show how much the Goths had already deviated from the primitive institutions of their ancestors. Among the Germans the companions fought for their chief ; but among the Visigoths the dependent retained for himself half of the spoils he acquired in war, and resigned only half to his patron<sup>2</sup>.

(P.)—Page 76.

As the proceedings in these cases afford a striking illustration of what was considered in those ages to be the relation of King and subject, I subjoin the speech of Trussell to Edward II., and an abstract of the proceedings against Richard.

The speech of Trussell, preserved by Knyghton<sup>3</sup>, is as follows :

Jeo William Trussell procuratour dez prelatez, contez, et barons, et altrez gentz en ma procuracye nomes eyant al ceo playne et suffisant pouare, lez homages et fealtez au vous Edward Roy d'Engleterre come al Roy avant ces œures de par les ditz personnes en ma procuracye nomes, rend et rebaylle sus a vous Edward, et deliver et face quitez

<sup>1</sup> Leg. Visigoth. l. v. t. iii. § 1.

<sup>2</sup> Ibid. l. v. t. iii. § 1, 3.

<sup>3</sup> Twysden, col. 2549.



les personnes avanditz en la meillour manere que ley et costome donnent. Et face protestacion en non de eaux qils ne voillent desormes estre in vostre fealte ne in vostre lyance, ne cleyment de vous come de Roy rien tenir. Encz vous tiegnent deshorse priveye persone sanz nule manere de reale dignite.

The same expressed or rather abridged in Latin is given as follows :

Ego Willielmus Trussell, vice omnium de terra Angliæ et totius parlamenti procurator, tibi Edwardo reddo homagium prius tibi factum, et extunc diffido te et privo omni potestate regia et dignitate, nequaquam tibi de cætero pariturus.

The proceedings against Richard are published at length in the rolls of Parliament. The following is an abstract of the most material parts.

Richard makes his abdication in the following manner : Ego Ricardus—omnes archiepiscopos, &c. —et ligeos homines meos quoscunque—a juramento fidelitatis et homagii, et aliis quibuscunque michi factis, omnique vinculo ligeantiæ ac regaliæ ac domini quibus michi obligati fuerant vel sint, vel alias quomodo libet astricti, absolvo ; et eos et eorum heredes et successores in perpetuum ab eisdem obligationibus et juramentis et aliis quibuscunque, relaxo, libero et quieto. He then enumerates all the royal dignities and prerogatives that do or may belong to him, all which, he says, renuntio, resigno, dimitto, et in eisdem cedo et ab eisdem recedo in perpetuum ; and confessing himself insufficient and incapable to govern the kingdom, he subscribes this declaration.

The renunciation of Richard was read on the following day in Parliament, and unanimously and cordially accepted by the lords spiritual and temporal and people there assembled, or, as they are afterwards called, by the states and people of the realm. It was thought proper, however, in justification of these proceedings, to exhibit articles of charge against the abdicated monarch, and to appoint procurators “ad resignandum et reddendum” dicto Regi Ricardo homagium et fidelitatem prius “sibi facta.”

The procurators appointed to this high office were two eminent lawyers, William Thirnyng and John Markham. Thirnyng had been created a puisne judge in the King’s Bench in the 11th of Richard, and raised to the dignity of chief-justice in the 19th of the same prince. He was continued in that office during the reign of Henry IVth, and retained it at the accession of Henry Vth. Markham had been made a puisne judge in the King’s Bench in the 20th of Richard, and remained in that situation under Henry IVth.

The speech made by Thirnyng to Richard was in the name “of all the states and all the people” “that was then gadyrd by cause of the summons” to Parliament, who have accepted, as he informs the King, his renunciation, and having “redd certain articles of defeaute in his governaunce, they” “have deposed him and adjugged him to be deposed and pryved of the astate of Kyng and of” “the lordeship contened in the renunciation and” “cession forsayd, and of all the dignitie and wyreshipp and of all the administration that longed

“ ther to. And we procurators,” he adds, “ of all  
 “ thes states and poeple forsayd, os we be charged  
 “ by him and by hir autorite gyffen us, and in hir  
 “ name, zeld zowe uppe, for all the states and poe-  
 “ ple forsayd, homage, liege and feaute, and all  
 “ ligeance, and all other bondes, charges and ser-  
 “ vices that long ther to. And that non of all thes  
 “ states and poeple from this time forward ne bere  
 “ zowe feyth ne do zowe obeisance os to ther  
 “ Kyng.”

I have quoted these passages as specimens of the language as well as of the sentiments of our forefathers.

(Q.)—Page 77.

The Marquess of Mondejar, in his historical memoirs of Alonso the Wise<sup>1</sup>, describes the singular right mentioned in the text as the general law of Spain; and speaking of the consequences that attend it, he says, *esto es perder el derecho i privilegios, de que gozaban como naturales suyos, los que se valian del, quedando libres por su medio, para poder servir a quien quisiessen, sin nota de haver faltado a la obligacion del vassallage debido a su señor natural.* The same privilege is thus defined in the *Partidas*<sup>2</sup>: *Desnaturar segunt language de España tanto quiere dezir como salir home de la naturaleza que ha con su señor e con la tierra en que vive.* The following are cases where this privilege might be lawfully exercised: *Esto es fuero de Castiella, si el Rey desafuera algund rico ome, que se tiene por desaforado e se fuer de la tierra,*

<sup>1</sup> Lib. v. ch. 15.

<sup>2</sup> Partida iv. tit. 24. l. 5.



suos vasallos e suos amigos deven ir con el e ayudarle, fasta que el Rey le rescive a derecho en sua corte. E si el Rey desafora algund fijodalgo, si este que se tiene por desaforado, es vasallo de algund rico ome, si el Rey non quisier judgar fuero por sua corte, suo señor con este suo vasallo pueden espedirse del Rey, si quieren salir de la tierra, e buscar senor que les faga bien<sup>1</sup>. The rules to be observed by those who avail themselves of this right are given in the *Fuero viejo*, and, with some differences, in the *Partidas*. Many instances where it was exercised are to be found in the histories both of Arragon and Castille. Though prohibited by the *Partidas*, it was not uncommon for Spanish nobles to go over to the Moors.

(R.)—Page 88.

When Madox asserts<sup>2</sup>, that “the whole justice of the kingdom was primarily and originally the “King’s,” he must be understood to speak of the ideal King of the law, and not of the real person who, in early times, bore the title of King in England. The fiction that all justice emanates from the King is, nevertheless, of great antiquity. It was completely established and adopted as a maxim of law in the time of Bracton. In treating of judicial procedure that author has the following remarks. *Ideo videndum erit de iis quæ pertinent ad regnum; quis primo et principaliter possit et debeat judicare: et sciendum est quod ipse rex et non alius, si solus ad hoc sufficere possit, cum ad*

<sup>1</sup> *Fuero viejo de Castilla*, l. i. t. iv. l. 1.

<sup>2</sup> *Exchequer*, i. 86. 4to.

hoc per virtutem sacramenti teneatur astrictus<sup>1</sup>. He adds afterwards<sup>2</sup>,—si ipse dominus rex ad singulas causas terminandas non sufficiat, ut levior sit illi labor, in plures personas, partito onere, eligere debet de regno viros sapientes, et ex illis constituere judiciarios. In the same spirit Britton commences his treatise on the law of England by putting these words in the mouth of Edward I.: Pour ceo que nous ne suffisons mye en nostre propre persone à oyer et terminer toutes quereles del people<sup>3</sup>; and Spelman adds his authority by saying, Omnis regni justitia solius Regis est<sup>4</sup>. “Le prince “est la source de toute justice” was also a fundamental principle of the ancient law of France<sup>5</sup>. The same theory was adopted in Castille<sup>6</sup>.

(S.)—Page 90.

Mably<sup>7</sup> has no doubt of the existence of appeals under the two first dynasties in France: Robertson<sup>8</sup> appears to entertain the same opinion. Montesquieu<sup>9</sup> treats at length of appeals to the King's court for default of justice and of appeals of false judgment. Meyer<sup>10</sup> admits of both, but contends that appeals, in the sense of applications to a higher court for the revision and amendment of the deci-

<sup>1</sup> L. iii. t. ii. c. 9. § 1. f. 107.

<sup>2</sup> Ib. c. 10. § 1.

<sup>3</sup> F. 1. a.

<sup>4</sup> Glossar. Cancellarius.

<sup>5</sup> Bouquet, Droit public de France. Avertissement.

<sup>6</sup> Marina, Ensayo, § 47.

<sup>7</sup> Observ. sur l'Hist. de France, l. ii. ch. 5. note 6, and l. iii. ch. 2. note 2.

<sup>8</sup> Charles V., Introd., note 23.

<sup>9</sup> Espr. des Lois, l. xxviii. ch. 27, 28.

<sup>10</sup> Esprit des Inst. Judic. i. 452–465.

sions given by inferior tribunals, were unknown till the establishment of the feudal system. If the judges of an inferior court pronounced an illegal or iniquitous judgment, they might be cited before a higher tribunal, and the case was again subjected to examination. If found guilty, they were fined or otherwise punished for their fault; but the judgment they had given, he pretends, was not disturbed or affected by the disgrace or punishment they had incurred. Respect was still had to the original principle of Northern jurisprudence, that every court is supreme as far as its jurisdiction extends. It was not till the introduction of the feudal gradations of authority, that appeals, in the sense of the civil law, could be carried from the court of an inferior lord to the court of his superior.

To the system maintained by this learned and ingenious author many objections present themselves. It seems incredible, that, in any system of judicature, there should be no power to rectify a judgment, which had been declared illegal and unjust by a tribunal competent to entertain the question. That the judicial system of the Barbarians was not liable to this reproach appears from many passages of their laws; to some of which Meyer has himself referred, though he disputes the conclusions to be drawn from them.

A law of the Bavarians<sup>1</sup> declares in direct terms, that a judgment founded in error shall be null and void: *Si—per errorem injuste judicaverit (judex), judicium ipsius, in quo errasse cognoscitur, non habeat firmitatem.* In order to carry this law into

<sup>1</sup> L. Bajuv. t. ii. c. 19.



effect, there must have been some court of revision or appeal to pronounce the first judgment erroneous.

A constitution of Clotaire I.<sup>1</sup> gives, in his own absence, to the bishops, a right of superintendence over the ordinary judges, with authority to make them review and amend their decisions when contrary to law and justice: *Si judex aliquem contra legem injuste damnaverit, in nostri absentia per episcopum castigetur, ut quod perpere judicavit, versatim melius discussione habita emendare procuret.*

In the prologue to the Burgundian law<sup>2</sup> it is expressly ordained, that a cause, which had been decided contrary to law, should be tried a second time: *Si quis sane judicum, tam Barbarus quam Romanus, per simplicitatem aut negligentiam præventus, forsitan non ea, quæ leges continent, judicavit, et a corruptione alienus est, xxx. solidos Romanos se noverit inlaturum, caussa denuo discussis partibus judicanda.*

From the Capitularies<sup>3</sup> it appears, that, according to the ancient law, one, who had lost his cause in an inferior court, was compelled either to acquiesce in the sentence, or to lodge an appeal to the King's Court: *De clamatoribus vel causidicis, qui nec judicium Scabiniorum adquiescere nec blasphemare volunt, antiqua consuetudo servetur; id est, ut in custodia reclaudantur donec unum e duobus faciant. Et si ad palatium pro hac re reclamaverint et litteras detulerint, non quidem eis*

<sup>1</sup> Baluz. i. 8.

<sup>2</sup> Canciani, iv. 13.

<sup>3</sup> Capit. 2. in 805. § 8. Lothar. 1. leg. Lombard. 64.

credatur, nec tamen in carcere ponantur ; sed cum custodia et cum ipsis litteris pariter ad palatium nostrum remittantur et ibi discutiantur sicut dignum est. Why was the party that appealed excused from acquiescing in the judgment of the inferior tribunal, unless the King's Court, to which he appealed, had the power, if it saw cause, to reverse the decision against him? That such a power was exercised habitually by the King's Court, appears from the account given by Hincmar of the palatine offices under Charlemagne. Describing the duties of the comes palatii, he mentions as one of the most important—*ut omnes contentiones legales, quæ, alibi ortæ, propter æquitatis judicium palatium aggrediebantur, juste determinaret, seu perverse judicata ad æquitatis tramitem reduceret*<sup>1</sup>.

These passages seem utterly irreconcilable with the conclusion of Meyer, that in the appeals known to the Barbarians, "*si le juge est condamné pour avoir manqué à son devoir, son arrêt n'en demeure pas moins inattaquable.*"

(T.)—Page 96.

As the passages referred to in the Year Books are curious and decisive, I shall insert them for the gratification of the reader.

Year B. 22 Edw. III. 3 b. Fuit dit—que en temps le Roy Henry et devant le Roy fuit emplede come serroit auten home de people : mez Ed. Roy son fitz ordeign que home sueroite vers Roy par petition.

Year B. 24 Edw. III. 55 b. Wilbye, a judge,

<sup>1</sup> *Théorie des Lois Polit. de France*, vii. Preuves, 166.

said, *Jaye viewe jadis tiel brief p̃r Henry Regi Angliæ, &c. en lieu de que est ore don peticion pur son prerogative.*

Year B. 43 Edw. III. 22. In an argument whether an advowson appendent to a manor passed from the crown with the grant of the manor, there being no words to that effect in the grant, Candishe says,—*En temps le Roy H. le Roy ne fuit mes come cõe parson, car a ceo temps home averoit briefe dentre sur dissēin vers le Roy et tous auters maners daceions come vers auter parson, issint a ceo temps quant le Roy donc un mañ fees et avowsons passer par son doñ auxibien come passer par auter doner.*

The conclusion with respect to advowsons was contested ; but no doubt was expressed of the allegation, that in the time of Henry III. the King might be sued like a private person. Judgment was given against the crown on the ground that before the statute *De Prærogativa Regis*, grants of the King were interpreted like those of common persons.

(U.)—Page 114.

The horror entertained by the ancient inhabitants of the North for the plunder or disturbance of the dead is strongly expressed in many of the laws of the Barbarians. To commit *walreaf*, that is, to strip a dead man, whether buried or not, of his arms or clothes, or of anything about him, was stigmatized by the Anglo-Saxons as the act of a *niþing*, which was with them the most severe term of reproach ; and if any one was appealed for so



unworthy a proceeding, he was bound to clear himself by the oaths of forty-eight full-born thegns<sup>1</sup>. One who disinterred or plundered a dead body, after it was buried, is declared a *wargus* or vagabond by the Salic law, and excluded from all intercourse with mankind till he has received forgiveness from the relations of the deceased, and obtained their intercession for his pardon. If food or shelter was given to him while he remained in this state of outlawry, the person who supplied his wants, though his wife or nearest relation, was subjected to a heavy penalty<sup>2</sup>.

This excessive abhorrence of violations of the sepulchre had most probably its origin in the ancient superstitions of the North. It was the belief of the Teutonic tribes, that the arms, dress, and ornaments, deposited with a warrior in his tomb, accompanied him to the hall of Odin, and served there for his use and decoration. It was their practice, therefore, to bury the dead in their best attire, and to place with them in the grave their arms, rings, bracelets, and other ornaments of gold and silver, with some coined money, in case they should have occasion for it<sup>3</sup>. To purloin any part

<sup>1</sup> Anc. LL. and Inst. p. 96. Bromton. col. 897. H. lxxxiii. 4, 5.

<sup>2</sup> Pact. Leg. Sal. Ant. t. xvii. § 2, 3; t. lviii. § 1. Reform. t. xvii. t. lvii. Similar, but less severe regulations against the spoliation of the dead are to be found in the laws of the Alamanni, t. l., and in those of the Bavarians, t. xviii. Among the Visigoths, if a freeman violated a sepulchre, and took from the dead body any of its ornaments or clothes, he received a hundred lashes, and had to pay a pound of gold; if a slave committed the same offence, he received two hundred lashes, and was burned alive. L. Visig. l. xi. t. ii. l. 1.

<sup>3</sup> Percy's Mallet, i. 344-346. Note of Eccard in Canciani, ii. 9.

of this deposit was resented as a grievous and irreparable injury to the dead. To the worshipers of Odin it must have appeared the same calamity as to their posterity seemed the denial of the rites of Christian burial, or the suppression of the prayers and masses appointed for the souls of the deceased.

(V.)—Page 132.

The different facts relating to the partition of land and chattels between the Barbarians and the Provincials, in whose territories they settled, have been collected by Savigny in his admirable work on the history of the Roman law in the middle ages. The following abstract of his researches may not be unacceptable to some readers.

Among the *Burgundians* the land was partitioned between the Romans and their Barbarian conquerors immediately after the settlement of the latter in the territory to which they gave their name. Of the houses, offices, and gardens, the Burgundian received the half; of the cultivated land two-thirds; and of the bondmen one-third. The woods remained common property. The free Burgundian, who arrived after the first division, received, without any of the bondmen, half of the cultivated lands; and the manumitted Burgundian had only one-third. There was an actual division of the land; but the whole territory was not divided at once between the two nations. Every Burgundian claimant had an estate assigned to him, of which he was entitled to the portion given to him by the law. The Roman, on whom he was quartered, is sometimes called his *hospes*, and sometimes the

Barbarian is called the *hospes* of the Roman; so that the relation between them was considered to be mutual and reciprocal. The share of the Burgundian was called his *sors*; and his right to it, *hospitalitas*. If any Burgundian accepted beneficiary lands from the King, he had no *sors* or allotment at the expense of his Roman *hospes*. Where the *sors* or allotment of a Burgundian was exposed to sale, his Roman *hospes* was entitled to the first offer; but no Barbarian could part with his *sors* unless he had lands elsewhere<sup>1</sup>.

Among the Visigoths also the Romans were deprived of two-thirds of their lands. Both the Gothic and Roman allotment was called *sors*<sup>2</sup>.

The Ostrogoths took one-third only of the lands of the Romans; but they retained the land-tax of the empire for lands held by the Provincials, their own estates being exempt from it. The portion they took to themselves was called *sors barbarica*. Roman estates once divided were not subject to a second partition<sup>3</sup>.

The Gothic monarchy in Italy having been subverted by the arms of Belisarius and Narses, the country fell a prey to the Lombards, a nation that had advanced with rapid strides from the interior of Germany into the heart of the empire, and had therefore acquired less of the habits and dispositions of civilized life than the tribes which had been long settled on the frontier. Instead of taking from their subjects one-third of their land, they made them contribute one-third of its produce. The Roman proprietor retained his land, and had the

<sup>1</sup> Savigny, i. 279–282.    <sup>2</sup> Ibid. 283.    <sup>3</sup> Ibid. 316–319.



expense and trouble of cultivating the whole ; but one-third of its produce he was compelled to give to the Lombard who was quartered on him as his guest. Individual Romans were put to death, and their estates confiscated ; but the partition of produce was the general rule adopted by the Lombards on their conquest of Italy<sup>1</sup>.

Neither in the histories nor in the laws of the Franks is there an allusion to any uniform mode of dividing among the conquerors the lands of the vanquished. But Romans continued to hold landed property, and the Roman system of taxation was maintained. Romans are distinguished in the Salic law as *convivæ Regis*, *possessores*, and *tributarii*. The *convivæ Regis* corresponded to the antrustions and leudes of the Barbarians ; the *possessores* were landed proprietors, whose estates were burthened with a land-tax ; the *tributarii* were Provincials subject to a poll-tax<sup>2</sup>.

(W.)—Page 133.

Muratori<sup>3</sup> adopts the definition of alodial property given by one of the old glossarists: *Alodium dicitur hæreditas, quam vendere et donare possum, ut mea propria*. Lands, says Bignon<sup>4</sup> in his notes on Marculfus, were divided into *propria* and *fiscalia*. *Propria seu proprietates dicebantur, quæ nullius juri obnoxia erant, sed optimo maximo jure possidebantur, ideoque ad hæredes transibant*. *Fiscalia*

<sup>1</sup> Savigny, i. 377–387.

<sup>2</sup> Ibid. 294.

<sup>3</sup> Ant. Med. Æv. Dissert. 11.

<sup>4</sup> Baluz. ii. 862. Canciani, ii. 177.

vero beneficia sive fisci vocabantur, quæ a rege ut plurimum, posteaque ab aliis, ita concedebantur, ut certis legibus servitiisque obnoxia cum vita accipientis finirentur.

Alodial land was termed by the Barbarians *hæreditas* from its inheritable quality, and *proprietas* because it was held in absolute property<sup>1</sup>. It was called *terra aviatica* or *alode parentum*, when it came to a man from his ancestors; and *comparatum* or *conquisitum*, when it was acquired by purchase<sup>2</sup>. The *terra salica* is supposed by some to have been land possessed by inheritance, in opposition to land obtained by purchase; and by others, to have been the land assigned to individuals as their private property at the time of the conquest<sup>3</sup>. In the ninth and tenth centuries land of inheritance was said to be alodial, though held of a lord or superior, and liable to him in rent and services<sup>4</sup>.

Alodial lands that came by inheritance descended to males in preference to females. In some nations the exclusion was absolute and perpetual<sup>5</sup>; but it might be defeated by a father who chose by deed

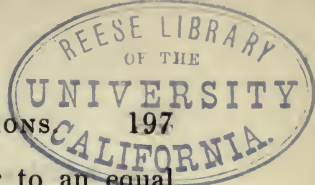
<sup>1</sup> Notes of Eccard on the Pact. Leg. Sal. Ant. t. lxii. Canciani, ii. 104. And Notes of Bignon on the Formulæ of Marculfus, ib. 185, 197.

<sup>2</sup> Ibid. Ibid. L. Ripuar. t. lvi. Marculf. Form. ii. § 4, 6, 7, 11, 12. App. 47, 49.

<sup>3</sup> Mably, Observ. sur l'Hist. de France, l. ii. c. 5. note 7. Guizot, Essais, 95.

<sup>4</sup> Baluz. ii. 144, 145, 147. It is in this sense the words *alodium* and *alodarius* are to be understood in Domesday.

<sup>5</sup> P. L. Sal. Ant. t. lxii. § 8. Reform. t. lxii. § 6. L. Ripuar. t. lvi. § 4.



to call his daughters to the whole or to an equal share of his inheritance<sup>1</sup>. Among the Anglii and Werini the daughters succeeded to the landed property of their father, if he had no male heirs within the fifth degree; “tunc demum,” says the law, “hæreditas ad fusum a lancea transeat<sup>2</sup>.” The Saxons preferred the son and the son’s son to the daughter, in the inheritance of landed property, but gave it to the daughter before the brother<sup>3</sup>. Among the Alamanni, if there was no son, the daughters succeeded to the paternal inheritance<sup>4</sup>; and the same rule was the general law of the Burgundians<sup>5</sup>.

All freemen, when legally summoned, owed military service to the state<sup>6</sup>. Alodial proprietors were subject, like others, to that obligation. But, as they served at their own expense<sup>7</sup>, it was found necessary, when kingdoms became extensive and military expeditions distant, to excuse from actual service those who were unable to defray the charge. Charlemagne fixed at three, four, or five mansi<sup>8</sup> the quantity of land that imposed on the proprietor the necessity of serving in person. Those

<sup>1</sup> Marculf. Form. ii. 10, 12. App. 47, 49.

<sup>2</sup> L. Angl. et Werin. t. 6. § 8.

<sup>3</sup> L. Saxon. t. 7. § 1, 5, 8.

<sup>4</sup> L. Alaman. t. 57.

<sup>5</sup> L. Burgund. t. 14. § 1.

<sup>6</sup> L. Ripuar. t. 65. § 1.

<sup>7</sup> Théorie des Lois polit. de la France, t. iii. Preuves, 68, 70.

<sup>8</sup> So called a manendo, from being the residence of a family. The division of lands into mansi seems to have been very general, if not universal, among the Franks. Many passages tend to show that the mansus consisted of a determinate quantity of land; but others are inconsistent with that supposition. See Théorie des Lois politiques de la France, t. ii. Preuves, 112–135.



who had less joined with others, who were in the same predicament, to furnish a soldier from the number of *mansi* required to supply one by law; and freemen who had no land were made to contribute in proportion to their personal estate<sup>1</sup>. Persons excused by their poverty from distant expeditions, were required to assist in the construction and repair of roads, bridges, and fortified places; and if the province where they resided was invaded, they were bound to take up arms in its defence<sup>2</sup>. Alodial proprietors and freemen in general were also obliged to provide lodging, entertainment, and means of conveyance for the *missi regis*, and ambassadors from foreign parts<sup>3</sup>; and on stated occasions they were expected to make free gifts to the King<sup>4</sup>.

(X.)—Page 135.

Some authors have confounded the *fisc* or property of the public, with the private or patrimonial estate of the King. Muratori has carefully distinguished them. “*Duplex bonorum genus regibus Italix fuit; alterum ad fiscum, sive ad coronam, pertinens; alterum patrimoniale sive dominicatum*<sup>5</sup>.” The same distinction is marked with the greatest accuracy in the laws of the Visigoths. In that nation monarchy was not merely in form, but

<sup>1</sup> Capit. 807. § 2. Capit. 1m. 812. § 1. repeated in Capit. 828. § 7.

<sup>2</sup> Capit. Carol. C. t. 36. § 27.

<sup>3</sup> Marculf. Form. i. § 11. L. Ripuar. t. 65. § 3. Capit. 819. § 16. Præcept. Ludov. P. pro Hispanis, § 1.

<sup>4</sup> Théorie des Lois polit. de la France, viii. Preuves, 154–160.

<sup>5</sup> Muratori, Antiq. Med. Æv. Diss. 19.

in practice, elective. From the first establishment of the Visigoths in Spain to the final extinction of their empire, there is but one instance of the crown passing in the direct line of descent from father to son for more than three generations. It became necessary, therefore, in justice to the families of those called to the throne, to keep distinct the property they possessed as individuals from the property they enjoyed in right of the crown. The regulations to that effect were numerous. Whatever any King of the Visigoths possessed by inheritance or acquired by gift or purchase, descended to his heirs; whatever belonged to the kingdom, went to his successor<sup>1</sup>.

The fisc belonged to the public. In the Lombard and Frank kingdoms of Italy it meant the fund or treasure "tum ad palatii splendorem sustinendum, tum ad tutelam regni, aut ad bellum necessitates, aliave publici regiminis munia opportunum<sup>2</sup>." From its destination to the public service it was called *pars publica*. By the Lombard law<sup>3</sup>, if a man held land which was proved to have been at one time *de publico*, and could not show that he had enjoyed the undisturbed possession of it for sixty years, he was bound either to produce a grant of the land to himself or to his ancestors, or to give it back to the public. Land holden by a serf or farmer of the King was held to be land of the public<sup>4</sup>. A grant of Charlemagne

<sup>1</sup> Leg. Visigoth. l. 2. t. 1. l. 6. See also Conc. Tolet. iv. § 75; viii. decretum; xiii. § 4; xvi. § 8; xvii. § 7.

<sup>2</sup> Muratori, Ant. Med. Ævi; Diss. 17.

<sup>3</sup> L. Liutprand. vi. 24.

<sup>4</sup> Ibid.

in 774 describes land, which had belonged to the fisc, as the property of the public and of the palace ; and a charter of 924 mentions, “ *curtem quandam* “ *juris regni nostri, quæ semper nostræ regiæ et* “ *publicæ parti pertinuit* <sup>1</sup>.” In 978, the Emperor Otho II. confirmed the Bishop of Cremona in the possession of certain duties “ *ad nostram olim publicam pertinentes partem ;*” and in 1038, Conrad the Salic, in regulating the mutual obligations of lords and vassals, describes the latter as persons, “ *qui beneficium de nostris publicis bonis aut de* “ *ecclesiarum prædiis—tenent* <sup>2</sup>.” To these authorities, collected by Muratori, may be added a precept of Dagobert I. of France, in which that monarch grants to the abbey of St. Denis all the duties and tolls arising from a fair he had established—“ *quicquam ad partem nostram vel fisco publico de* “ *ipso mercado ex ipsa mercimonia exactare potuerit* <sup>3</sup>.” Lewis I. having improvidently given away many of the royal villis to his nobles, while he administered the government of Aquitaine under his father, Charlemagne sent two of his missi into that province, “ *præcipiens, ut villæ, quæ eatenus* “ *usui servierant regio, obsequio restituerentur* “ *publico* <sup>4</sup>.”

Mably and Guizot<sup>5</sup> regard the notion of public property set apart for the service of the state, as a refinement too great for Barbarians. These excel-

<sup>1</sup> Muratori, *Antiq. Med. Æv. Diss.* 18.

<sup>2</sup> *Ib.* Canciani, i. 236 ; v. 43.

<sup>3</sup> D. Bouquet. iv. 627.

<sup>4</sup> *Ib.*

<sup>5</sup> Mably, *Observ. sur l'Hist. de France*, l. 1. ch. 3. note 4. Guizot, *Essais sur l'Hist. de France*, p. 123.



lent authors forget that for ages before the Teutonic nations quitted their original settlements, the territory they possessed had been considered the common property of the tribe<sup>1</sup>, and that the portions detached from it for the use of individuals, reverted after a limited time to the public. They forget also, that payments to the state were known to the Germanic nations in the time of Tacitus, and consequently that the notion of public property was familiar to them before their establishment in the empire. The lesson these Barbarians had to learn was not a knowledge of public or common property in land, but of private, patrimonial, inheritable estates. The conversion of land from public to private property has been, doubtless, in its consequences, highly beneficial to the community; but, when first carried to a great extent, there is reason to believe it was equally unpopular with the division of commons in modern times. The appropriation in perpetuity to private persons and their heirs, of lands that had formerly belonged to the community, and of which every one in his turn

<sup>1</sup> This notion seems to have prevailed very generally, if not universally, in the infancy of nations. Vestiges of it are still to be found in the province of East Friesland (*Edinb. Review*, vol. xxxii.); and periodic allotments of land, founded on the same principles, continue to be made by the Afghauns, a singular race, who, in the heart of Asia, exhibit in their laws, character, and political institutions, a most striking similitude to the ancient Germans. For an admirable description of this extraordinary people, the reader will do well to consult Elphinstone's *Account of Caubul*, the most valuable and instructive work, with the exception of Volney's, that has appeared on any oriental nation in modern times.

might hope to obtain at least temporary possession, seemed an encroachment on the ancient rights of the public. To protect and preserve from destruction the landmarks that served to distinguish the boundaries of private estates, laws and penalties were found necessary<sup>1</sup>. Rights of common were retained; and among the Visigoths in Spain large tracts were set aside for pasturage, under the name of *campi vacantes*, which no one had a right to enclose or appropriate<sup>2</sup>. Such was the deference for ancient usage, and so strong the recollection of common property in land, that in many parts of Europe the cultivated fields were everywhere open to the public from the separation of the crop to the ensuing seedtime. In France this was called the *temps de banon*<sup>3</sup>.

An estate belonging to the Fisc or public was called a fisc; and the persons who cultivated and paid rent for it, whether serfs or freemen, were called Fiscalini<sup>4</sup>. Estates that lapsed for want of heirs<sup>5</sup>, and lands forfeited for delinquencies<sup>6</sup>, escheated to the Fisc; that is, they reverted to the

<sup>1</sup> L. Langobard. Rotharis. 240. L. Visigoth. l. 10. t. 3. l. 1, 2. L. Bajuv. t. 11. c. 1. § 1, 2. L. Burgund. t. 55. § 4.

<sup>2</sup> L. Visigoth. l. 8. t. 3. l. 9; t. 4. l. 26.

<sup>3</sup> Ib. l. 8. t. 3. l. 12, with Canciani's note. Hickes, Gram. Anglo-Saxon. 163.

<sup>4</sup> Spelman, Glossary.

<sup>5</sup> Edict. Theodoric. reg. § 24. L. Salic. ref. t. 63. L. Ripuar. t. 57. § 4. t. 61. L. Alaman. t. 25. t. 40. L. Bajuv. t. 14. c. 9. § 4.

<sup>6</sup> P. Leg. Sal. ant. t. 59. Reform. t. 59. L. Ripuar. t. 69. § 1, 2. L. Bajuv. t. 2. c. 1. § 1; c. 2. Leg. Langobard. Carol. M. § 5. Capit. l. 4. § 24; l. 5. § 383; l. 6. § 431.

state from which they had been derived. Penalties for transgressions<sup>1</sup>, and part of the dues for the administration of justice<sup>2</sup>, were also payable to the Fisc. As the Fisc was administered by the King and his officers, its estates are often called the King's fises, their cultivators the King's fiscalini, and the dues belonging to it were said to be paid *ad partem regis*<sup>3</sup>.

Besides escheats for want of heirs, forfeitures for transgressions and other casualties authorised by law, the fisc was often enriched by illegal confiscations. Many instances of this injustice are to be found in the writings of Gregory of Tours and other historians. One deserves to be mentioned, because it describes in language not to be mistaken, the original and primitive notion of the fisc as being property that belonged to the public. Childebert II. had one Magnovald assassinated in his palace at Metz, *resque ejus protinus direptæ et ærario publico, quantum repertum est, sunt illatæ*<sup>4</sup>.

Grants of fiscal lands to the church were innumerable. They began with the conversion of Clovis, and continued to the extinction of the Carolingian dynasty. "Our fisc," exclaimed Chilperic II., "is reduced to beggary; our riches have been

<sup>1</sup> P. L. Salic. Ant. t. 65. Reform. t. 63 and t. 65. Capit. Part. Saxon. § 16. L. Bajuv. t. 2. c. 4. § 1; t. 6. c. 6, 7. L. Alaman. t. 4.

<sup>2</sup> L. Ripuar. t. 89. Marculf. 1. § 20. Capit. 1. 4. § 56. L. Alaman. t. 1. § 2; t. 3. § 3; t. 31. § 1.

<sup>3</sup> Capit. 1. 3. § 82. Leg. Langob. Carol. M. 5. Capit. 1. 3. § 16. L. Frision. t. 3. § 2, 3, 8; t. 17. § 4, 5. Capit. 1. 3. § 30; 1. 4. § 5.

<sup>4</sup> Greg. Tur. L. 8. c. 36, as quoted by Guizot, *Essais*, p. 125.



“ transferred to the church ; the clergy alone have  
“ power ; the splendour of the crown has vanished  
“ and gone to decorate the mitre of the bishop<sup>1</sup>.”  
The spoliation of the church by violence was the natural result of the exorbitant wealth it had acquired. Unable to recompense his soldiers for their services against the Saracens, Charles Martel quartered them on his clergy. A compromise was afterwards effected by his successors, which restored part of its possessions to the church, and established tithes over Christendom.

The conversion of fiscal into alodial property is coeval with the first establishment of the Barbarians in the empire. An alodial estate was in strictness nothing but a portion of the national territory assigned in perpetuity to an individual and his heirs. The Burgundian law<sup>2</sup>, in appointing to fresh adventurers a smaller portion of land than had been given to the original conquerors, plainly indicates, that the whole territory had not been exhausted by the first partition, and that the lands which remained undivided were still at the disposal of the state. A formula is to be found in Marculfus<sup>3</sup> for the grant of fiscal lands in perpetuity, which were thereby changed into alodial possessions. Some authors have considered this formula of Marculfus as a precedent for the grant of an hereditary benefice. But it is only necessary to read with attention the act itself, to perceive, that what it creates is not an hereditary benefice, but an alodial estate. It is viewed in this light by Bignon

<sup>1</sup> Guizot, 115. Greg. Tur. L. 6. c. 46.

<sup>2</sup> Additam. 2m. § 11.

<sup>3</sup> Lib. i. § 14.

in his notes on a subsequent formula<sup>1</sup>, confirmatory of what had been done under the preceding one; and it is only from inadvertence that it could have been considered in a different point of view. It contains the legal form required for the grant of a vill with its appurtenances, “sicut a fisco nostro” “possidetur—viro inlustri—in integra emunitate<sup>2</sup>” “—perpetualiter—ita ut eam jure proprietario—” “habeat, teneat atque possideat, et suis posteris—” “aut cui voluerit ad possidendum relinquat, vel” “quicquid exinde facere voluerit.” There can be no doubt that this is the grant of an estate in absolute property. The formula that immediately follows, contains the precedent for a similar donation to the church in nearly the same words.

The earliest instance I have found of the transmutation of fiscal into alodial property occurs in a diploma of Charles Martel<sup>3</sup>, executed in 726. After a description of the property, the deed proceeds to say, “rex Hildebertus genitori nostro Pippino de” “suo fisco—concessit—et mihi—Pippinus jure” “hæreditario in proprietatem concessit.” In the time of Charlemagne the fraudulent conversion of fiscal lands into alodial estates by the counts and by holders of benefices, made it necessary to frame a law against a practice so injurious to the public. “Auditum habemus,” says Charlemagne, “qualiter” “et comites et alii homines qui nostra beneficia” “habere videntur, comparant sibi proprietates de” “ipso nostro beneficio. Audivimus,” he proceeds

<sup>1</sup> Lib. i. § 17.

<sup>2</sup> i. e. with exemption from foreign jurisdiction.

<sup>3</sup> D. Bouquet. iv. 705. No. 121.

to state, “ quod alibi reddant beneficium nostrum  
 “ ad alios homines in proprietatem, et in ipso pla-  
 “ cito dato pretio comparant ipsas res iterum sibi  
 “ in alodum. Quod omnino cavendum est, quia  
 “ qui hoc faciunt, non bene custodiunt fidem quam  
 “ nobis promissam habent. Et ne forte in aliqua  
 “ infidelitate inveniantur, quia qui hoc faciunt, per  
 “ eorum voluntatem ad aures nostras talia opera  
 “ illorum non perveniunt<sup>1</sup>.”

It appears from this capitulary, that the lands of the fisc could be converted into alodial property in the placita or courts held by the count; but that the count was responsible for the act, and in the instances which gave occasion to the law, that he had concealed from the government what he had done, from a consciousness that he had conducted himself fraudulently and to the prejudice of the state.

The conversion of fiscal into alodial property was checked, but not abolished, by this enactment. A charter of Lewis III., in 901, grants to one Herrad a vill “ pertinentem hactenus de fisco imperiali,” with power “ donandi, ordinandi, commutandi, vendendi, sive quovis titulo inscriptionis alienandi, “ remota totius publicæ potestatis inquietudine<sup>2</sup>.”

Part of the fiscal lands was appropriated to defray the maintenance of the royal household and expenses of the government. Part was given under the name of benefices to the Antrustions, Leudes, or vassals of the King, as a reward for their past and security for their future services to the state.

<sup>1</sup> Capit. 5m. a. 806. § 7, 8. Baluz. i. 453.

<sup>2</sup> Muratori, Ant. Med. Ævi, Diss. 19.



This distinction is accurately made in the Capitula, drawn up by the bishops of France in a synod held at Epernay in 846, and presented to Charles the Bald and his nobles. “Videtur nobis,” say these prelates, “utile et necessarium ut fideles et strenuos  
 “missos ex utroque ordine per singulos comitatus  
 “regni vestri mittatis, qui omnia diligenter inbre-  
 “vient quæ tempore avi ac patris vestri vel in regio  
 “specialiter servitio vel in vassallorum dominico-  
 “rum beneficiis fuerunt, et quid vel qualiter aut  
 “quantum exinde quisque modo retineat, et se-  
 “cundum veritatem renuntietur vobis.” They go on to propose, that all reasonable grants should remain untouched, but that those which appeared to have been fraudulently obtained, or irrationally made, should be corrected “consilio fidelium ves-  
 “trorum,” to the end that your household may be upheld, your servants recompensed, “et sic demum  
 “res publica vestra de suo suffragetur sibi<sup>1</sup>.” The proposition of the bishops was rejected by the nobles; but it establishes the fact, that there were two classes of fiscal lands, one employed in benefices, the other employed to defray the expenses of the government. Montesquieu<sup>2</sup> says the latter were termed *regalia*, but I can find no authority for the word in that acceptation. In the time of Charlemagne they are sometimes called *fiscs* simply, in contradistinction to benefices, as in the following capitulary: “Ut non solum beneficia abbatis—  
 “vassallorum nostrorum, sed etiam nostri fisci de-  
 “scribantur, ut scire possimus quantum etiam de

<sup>1</sup> Capit. Carol. Calv. t. 7. § 20. Baluz. ii. 31.

<sup>2</sup> Espr. des Lois, l. 30. ch. 16.

“nostra in unius cujusque legatione habeamus<sup>1</sup>.” At other times they are called “villæ nostræ, quas “ad opus nostrum serviendum institutas habemus,” and directions are given for their administration, such as a great proprietor might be supposed to issue for the management of his estate<sup>2</sup>.

“Les biens réservés pour les leudes,” says Montesquieu<sup>3</sup>, “furent appelés des biens fiscaux, des “bénéfices, des honneurs, des fiefs dans les divers “auteurs et dans les divers temps.” On this point it is unnecessary to enlarge, as there is but one opinion respecting it. But the case is different with regard to the length of time for which benefices were originally granted. Montesquieu, Mably, and Robertson, with most of the writers on the feudal law, agree in the conclusion, that benefices were at first revocable at the pleasure of the grantor. Muratori maintains the contrary. “Prima “notio veterum beneficiorum,” says that learned antiquary, “hæc fuit, videlicet jus in acquirentem “translatum perfruendi prædia tradita, dum vita “comes esset<sup>4</sup>.” Bouquet also controverts the doctrine of the feudists, that benefices could be resumed at pleasure, or were ever granted for a single year. “Les capitulaires, qui défendent d’ôter un “bénéfice sans une cause légitime, sont absolument “contraires à cette opinion<sup>5</sup>.” Hallam and Guizot have taken the same view of the question, and from

<sup>1</sup> Capit. 3m. a. 812. § 7.

<sup>2</sup> Capitul. de Villis. Baluz. i. 331–342.

<sup>3</sup> Espr. des Lois, l. 30. ch. 16.

<sup>4</sup> Muratori, Ant. Med. Ævi, Diss. 11.

<sup>5</sup> Bouquet, Le Droit public de France, 240.

the facts and arguments which they have adduced, no doubt can remain, that from their commencement, benefices were granted for life, subject to forfeiture for misconduct, and, from the violence of the times, liable, like every other species of property, to illegal confiscation<sup>1</sup>.

Benefices were granted by alodial proprietors as well as by the fisc. It is probable, that this practice was resorted to whenever the estate of an alodial proprietor was larger than the maintenance of his household and private establishment required. The King, as possessor of a great alodial property, must also have granted benefices from his patrimonial estate. But in the kingdoms, where royalty ceased in practice to be elective, the private estate of the King came to be confounded with the fisc or property of the public, of which he was the principal administrator, and, as representative of the state, the nominal distributor. The original difference, however, between these two species of property was not entirely forgotten. So late as the reign of Lewis I. we find on one occasion a distinction made between the benefices of the King and those of the kingdom. If any one, says that prince, who holds honores nostros, shall neglect or refuse to entertain ambassadors coming to us, or to furnish them with the means of conveyance, "*nec nostrum nec regni nostri honorem ulterius volumus ut habeat*"<sup>2</sup>.

From the first establishment of the Burgundians

<sup>1</sup> Hallam, *Middle Ages*, i. 160-163, 8vo. Guizot, *Essais sur l'Hist. de France*, 129-133, 139-141.

<sup>2</sup> Capitul. 823. § 16. Baluz. i. 637.



in Gaul royal grants among that people appear to have been hereditary ; but those who held them were excluded from the allotments of alodial property, distributed to other freemen<sup>1</sup>. The cause of this singularity has not been explained. In Spain benefices of the crown were declared hereditary before the middle of the seventh century<sup>2</sup> ; and those of private individuals could not be resumed on the death of the person to whom they had been given, if his son was willing to continue in the service of the grantor<sup>3</sup>. Among the Franks hereditary benefices were slowly and gradually introduced. It seems generally admitted, that the benefices of the Merovingian Kings were made hereditary by the treaty of Andely in 587, confirmed by the edict of Clotaire II. in 615<sup>4</sup>. Benefices for life continued, however, to be granted by Charlemagne and his successors, and by whatever means it was brought about, there is reason to believe, that under the first princes of the Carlovingian dynasty, the greater number of benefices were of that description. Under Lewis I. hereditary grants became frequent, and a capitulary of Charles the Bald in 877, had the effect of converting all benefices into hereditary possessions<sup>5</sup>.

One who held a benefice might grant any part of

<sup>1</sup> L. Burgund. t. 1. § 3, 4 : t. 54. § 1.

<sup>2</sup> Conc. Tolet. v. in 636. § 6. Conc. Tolet. vi. in 638. § 14. Leg. Visigoth. l. 5. t. 2. l. 2.

<sup>3</sup> Leg. Visigoth. l. 5. t. 3. l. 1, 4.

<sup>4</sup> Mably, *Observ.* l. 1. ch. 4, note 3 and 5. Guizot, *Essais*, 142.

<sup>5</sup> Mably, *Obs.* l. 1. ch. 3, note 2. L. 2. ch. 5, note 3. Guizot, *Essais*, 140-145.

it to a third person to hold of himself, and by this practice, when it became general, a gradation of beneficiaries was every where established, from the first grantor to the actual occupant of the land.

The holders of beneficiary lands were bound, like alodial proprietors, to render military service to the state, and the neglect or refusal of this duty subjected the beneficiary to the forfeiture of his benefice<sup>1</sup>. Whether they held of the fisc, of the church, or of private persons, their obligation of military service was the same<sup>2</sup>. Some persons were excused from this duty, but the number was not great; and if any others attempted fraudulently to elude its performance, they were fined<sup>3</sup>. Those who held lands of the fisc were compelled, under the penalty of losing their benefices, to entertain the missi regis and ambassadors going to court, and to convey them forward on their journey<sup>4</sup>. So far beneficiaries had the same obligations to discharge as alodial proprietors; but, in addition to these duties, they were bound to be true and faithful to the person from whom they held their benefice; to assist him in his private wars<sup>5</sup>; to attend his court; and to render him various services, personal and domestic. These duties, borrowed from the ancient relations of chief and companion, were at first vaguely and loosely defined; but as benefices were converted into hereditary possessions, they became

<sup>1</sup> Capit. 807. § 1. Capit. 2m. 812. § 5.

<sup>2</sup> Capit. 1m. 812. § 5. Capit. 2m. 812. § 7. Capit. 5m. 819. § 27.

<sup>3</sup> Capit. 1m. 812. § 4, 9. Capit. 2m. 812. § 9. Capit. 5m. 819. § 27.

<sup>4</sup> Capit. 823. § 16.

<sup>5</sup> Capit. 2m. 813. § 20.

more fixed, precise, and determinate. In return for these services and duties, the lord was bound to maintain his beneficiary or vassal, as he was called, in the land he had given him, and to protect and defend him with all his power. According to the fundamental principle of the connexion between lord and vassal, their obligations were mutual and reciprocal. “Quantum homo,” says Glanville<sup>1</sup>, “debet domino ex homagio, tantum debet illi do-  
minus ex dominio, præter solam reverentiam.”

The protection and security which a beneficiary or vassal derived from his connexion with a powerful superior, led to a practice that seems at first sight unaccountable. It was the custom of alodial proprietors, from a very early period<sup>2</sup>, to surrender their estate to the King, or church, or to some one able to defend them, on condition of receiving it back again as an hereditary benefice<sup>3</sup>. Benefices of this description were called *fiefs de reprise*, and by some they are supposed to have been more numerous than the fiefs or benefices created by real grants<sup>4</sup>.

Precariæ and prestariæ were grants of land from the church, with some rent or service, in general, annexed to them. They might be conferred for life or for a term of years. The reversion was in the church; but the holders often succeeded in converting them into hereditary possessions, and the church was often defrauded of the rent and services reserved in the deed of gift. In some in-

<sup>1</sup> Glanville, l. 9. c. 4.

<sup>2</sup> Marculf. i. § 13.

<sup>3</sup> Espr. des Lois, l. 31. ch. 8.

<sup>4</sup> Montlosier, Monarchie Française, l. 72, 332.



stances they were real grants. In other cases they were fiefs de reprise, the proprietor having surrendered his estate to the church, with the reservation of a life estate to himself or to some other person. They were sometimes held of laymen<sup>1</sup>.

The same person often possessed both alodial and beneficiary property. That, which was alodial, he could dispose of at his pleasure. That, which was beneficiary, reverted to the donor on the expiration of the term for which it had been granted<sup>2</sup>.

(Y.)—Page 136.

Somner takes the following description of *bôc*-land from an old leiger-book in Guildhall—"terra, "quam homo potest in lecto suo languens legare<sup>3</sup>." But this description applies to one species of *bôc*-land only, viz. to an estate in fee-simple. In the old Latin version of the Anglo-Saxon laws, published by Bromton, the word *bôc*land is rendered *terra hæreditaria* in Alf. 3. and in Cn. P. 75—*hæreditas* in Cn. E. 11—*terra testamentalis* in Jud. Civ. Lund. and in Cn. P. 12—*terra libera* in Ethelr. 2—*feodum* in Edg. E. 2<sup>4</sup>—and in the *Textus Roffensis* it is repeatedly translated *alodium*. It occurs sometimes, though rarely, after the Conquest. In a deed subsequent to that period it is described by the proprietor as land "de qua nulli respondeo<sup>5</sup>."

<sup>1</sup> Guizot, *Essais*, 133–139. Marculf. Form. ii. § 5, 6, 40, 41. Append. 27, 28, 41, 42. Sirmond. Form. 7. Bignon. Form. 20. L. Alaman. t. 2. § 1.

<sup>2</sup> Bouquet, *Droit public de France*, 387. Robertson's Charles V., note 8.

<sup>3</sup> Somner's *Gavelkynd*, 83.

<sup>4</sup> Anc. LL. and Inst. pp. 496, 544, 537, 534, 518, 526, 524.

<sup>5</sup> Ibid. 121.

It is found once only in Domesday in the sense of tenure. Certain lands are said to have been held in *bôcland* in the time of King Edward<sup>1</sup>. The word *alodium*, when it occurs in that work, appears to be used in the sense of hereditary property.

(Z.)—Page 146.

Among the Scandinavians *län* was a military feud, and the persons who held such feuds were called *lænsmen* or *lændirmen*. “*Observandum est*,” says Ihre, “*feuda alia apud nos i len concessa fuisse, alia at veitslu. Priora qui tenebant, certum militum numerum in aciem educere debebant; posteriora vero habentes, commeatum præbebant, aut definito cœnarum numero principem cum comitatu cibare tenebantur*<sup>2</sup>.” In a passage of the *Heimskringla*, to which he refers, it is said of Halogaland, a province of Norway, that it had been held by Harek, *suma at veitzlo enn suma at leni*—“*partim data sumtibus ad convivia ferendis, partim feudo*<sup>3</sup>.” I have found no traces of this use of the word *læn* among the Anglo-Saxons.

(AA.)—Page 151.

Reveland is distinguished in Domesday from *vilain-land* and *thegn-land*, and a comparison of different entries leads to the conclusion, that it was land attached to the office of *gerefa*. When land was fraudulently converted from *thegn-land* into *reveland*, it was subtracted from the military ser-

<sup>1</sup> 1 Domesday, f. 11 b.

<sup>2</sup> Glossar. Suio-Goth. *län*, *veitsla*.

<sup>3</sup> *Heimskringla*, ii. 200. Edition of 1778.

vice of the state, and appropriated by its civil servants, the gerefan, to the increase of their own salaries or stipends. Complaints of this abuse are made in Domesday<sup>1</sup>.

Thegn-land was distinguished from ferm-land, demesne land, and villein-land<sup>2</sup>. If a doubt was entertained whether certain lands were thegn-land or not, the question was tried and decided in a court of law<sup>3</sup>. But these different species of property might be exchanged<sup>4</sup>; and in some cases the one appears to have been arbitrarily converted into the other<sup>5</sup>.

Land held for rent is mentioned at a very early period in the Anglo-Saxon laws. The rent was discharged partly by payments in kind, and partly by the performance of servile offices<sup>6</sup>. By a law of the Conqueror nothing more could be exacted from the cultivators of the soil than the rent due for their land, and while they were able to do their lawful service, they could not be expelled from their farms<sup>7</sup>. The services due from land were distinguished in later times into free or noble, and base or villein; but, in Saxon times, the distinction was unknown or little regarded. The country between the Ribble and the Mersey was held under the Confessor by a multitude of thegns, who were bound to work like villeins in the reparation of the King's

<sup>1</sup> 1 Domesday, 57 b, 69 a, 179 b, 181 a 2.

<sup>2</sup> Ibid. 64 b 2, 76, 86 a, 90 b, 98 b, 162 b.

<sup>3</sup> Ibid. 98 b bis, 181, 262 b 2. Spelman, Glossary, *Teinland*.

<sup>4</sup> Ibid. 64 b 2.

<sup>5</sup> Ibid. 67 a ter, 67 a 2 bis, 67 b 1, 76.

<sup>6</sup> In. 6, 23, 44, 59, 67, 70.

<sup>7</sup> Will. Conq. 33.



vills, to assist in his fisheries, to keep in order the hedges and hunting stations in his forests, and in harvest to send their reapers to cut down his corn. Yet these men are called *liberi homines*, and as such gave their attendance at the hundred and county courts, paid relief for their lands, and might quit them when they pleased on the payment of a fine<sup>1</sup>. Many tenants of the see of Worcester were in like manner bound to the performance of base as well as of free services<sup>2</sup>.

<sup>1</sup> 1 Domesday, 269 b.

<sup>2</sup> Heming, 292.

AN INQUIRY

INTO THE

LIFE AND CHARACTER OF KING EADWIG.





# AN INQUIRY

INTO THE

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EADWIG, the fourth in descent from Ælfred, is described by our monkish historians as a voluptuous and rapacious tyrant, whose misgovernment provoked an insurrection of his subjects north of Thames, and occasioned his expulsion from that part of his dominions.

The evidence, however, on which these imputations rest, is far from being clear, consistent or satisfactory. Some of the charges against him are doubtful, and others are unquestionably false. In some chronicles of a very early date a favourable impression is given of his character, and there are statements in others that throw discredit on the story commonly told of his misfortunes.

His enemies on the other hand, while they concur in representing him as a monster of wickedness and impurity, contradict themselves flatly when they descend to the particulars of his life. All agree, that his connexion with a lady or ladies, whom some call Æthelgifu, Ethelgiva, others Ælf-

gifu, Alfgiva, Elfgiva, Algiga or Elgiva, had a principal share in the calamities of his reign. But of the nature of that connexion different and inconsistent accounts seem at a very early period to have prevailed. Some describe her as his wife by an uncanonical marriage, others consider her his mistress, and some pretend that she was the wife of another man.

Modern historians have not sufficiently attended to these variations in the original authorities, and have overlooked the conclusion to which they naturally lead. What is uncertain in the history of Eadwig they have admitted without examination, what is doubtful they have not questioned, and what is manifestly false they have received as authentic. But, while all have adopted the tragical part of his story, every one in relating it has followed the version most agreeable to the prejudices of his own sect or party. Protestant writers, not content with the beauty allowed to Ælfgifu even by her enemies, have clothed her in innocence and exhibited her as an injured queen, the victim of bigotry and fraud. Catholics, on the contrary, have painted her as a shameless and profligate woman, who richly merited the ignominious and cruel fate that terminated her sufferings.

To ascertain the truth amidst this conflicting evidence may be impossible, and if practicable, perhaps hardly worth the trouble. But, though the question in dispute be of little importance, and the task not easy to reconcile the contradictory statements of our monkish guides, it may silence the vituperative language of our modern polemics,

if it can be shown, that whatever part we take in the controversy, respectable authorities may be brought in favour of the side we espouse, that whether we maintain Eadwig to have been an amiable prince or a cruel tyrant, whether we hold Ælfgifu to have been his wife or his mistress, plausible arguments may be offered for our opinion. It is hard if we cannot discuss the merits of Dunstan or look into the scandalous chronicle of the tenth century, without being accused of malice or reviled for irreligion.

Of the early historians who have spoken favourably of Eadwig, Ethelwerd is the most distinguished. This noble Saxon, the kinsman of Eadwig, may be considered as a contemporary writer, since he terminates his abridgement of English history with Eadgar, brother of that prince, and wrote, as it is supposed, in the time of Eadward the Martyr, Eadwig's nephew. In the few lines Ethelwerd bestows on the short reign of Eadwig, he is not only silent about his vices and misfortunes, but, after praising the uncommon beauty of his person, he adds, "*tenuit quadriennio, per regnum amandus.*" Is it possible that this character could have been given of a prince whose subjects, in the life-time of the writer, had risen against his authority and expelled him for his misconduct from two-thirds of his kingdom?

Henry of Huntingdon is an authority of less weight than Ethelwerd. He lived in the time of Henry II., and where he is not the copyist of Bede, or translator of the Saxon Chronicle, he is justly regarded by the editor of the last-mentioned work



as of no better credit than Geoffrey of Monmouth. But still the account he gives of Eadwig he must somewhere have found; and though in the selection of authorities his judgment may be weak, the story he tells must have been previously told by others. Of Eadwig he says, "*non illaudabiliter regni infulam tenuit,*" and adds, "*cum in principio regnum ejus decentissime floreret, prospera et lætabunda exordia mors immatura per-*"  
"*rupit.*"

To these authorities in favour of Eadwig may be added the negative evidence of the Saxon Chronicle, and of the History of Abingdon.

The historian of Abingdon praises Eadwig for his kindness and liberality to St. Æthelwold, abbot of that monastery, and afterwards bishop of Winchester; and gives an account of his death and of the accession of his brother, without the slightest censure of his memory, or abuse of his government.

The Saxon Chronicle relates the principal events of the life of Eadwig without comment and reprehension, and one very ancient manuscript of that work, called the Worcester Chronicle, indirectly contradicts the story of the Mercians and the Northumbrians having revolted against him and expelled him from the country north of Thames, by stating that on the death of Eadred, Eadwig had the government of the West Saxons, and his brother Eadgar that of the Mercians.

It cannot, however, be denied, that the general consent of historical tradition is at variance with this account. Other manuscripts of the Saxon

Chronicle state in general terms, that on the decease of his uncle, Eadwig assumed the government ; and one manuscript, which is supposed to be in the hand-writing of St. Dunstan, postpones to the following year the accession of Eadgar to the Mercian kingdom. The earliest life of Dunstan, written within fifteen years after his death, tells us, that on the decease of Eadred, Eadwig was elected king, “*ab utraque plebe,*” that is by the Mercians as well as by the West Saxons ; and in the progress of his narrative the same biographer informs us, that Eadwig having fallen into contempt for his folly, was abandoned by his northern subjects, who chose his brother Eadgar for their king, in consequence of which the kingdom was divided between the brothers, the country north of Thames being assigned to Eadgar and the southern parts retained by Eadwig. It is needless to add, that this is the story adopted by later writers.

It would reconcile these contradictory accounts, if the separation of the Mercian from the West Saxon government, which is stated in the Worcester Chronicle to have taken place immediately on the death of Eadred, was confined to the direct administration of the two kingdoms ; the supreme authority over the whole remaining with Eadwig, as elder brother and king of the West Saxons, who from the time of Ecgbert had been the predominant tribe throughout England. On that supposition, what is subsequently termed the insurrection of his northern subjects against Eadwig, may have been merely the rejection of his personal authority by

the Mercians, and the elevation of his brother to an equal and independent sovereignty. Latin writers have indulged their fancy in descriptions of a civil war between the two brothers, in which the partisans of Eadwig were worsted, and himself driven across the Thames, hotly pursued by the insurgents, seeking his safety in by-paths and hidden places, to elude the scent and escape the vengeance of his enemies. But there is not a word of these details in the contemporary life of Dunstan, our earliest and best authority for these transactions. The author of that work simply tells us, that Eadwig was abandoned by his northern subjects, "*quia in commisso regimine insipienter egisset, sagaces et sapientes odio vanitatis disperdens, et ignaros quosque, sibi consimiles, studio dilectionis adsciscens.*" He gives us no hint of a civil war. He alludes to no party for Eadgar among the West Saxons; and says expressly, that to the north of Thames, Eadwig was deserted and Eadgar elected king "*conspiratione omnium.*" The respective claims of the brothers appear to have been settled without bloodshed, "*ex definitione sagacium, universo populo testante.*"

The facility with which this revolution was accomplished, and the limits where it stopped, favour the supposition, authorized by the Worcester chronicles, that on the death of Eadred the administration of the Mercians was confided to Eadgar, and that Eadwig, in addition to his government of Wessex, was merely the paramount lord of the kingdom. In examining his charters, I find some



grants within the Mercian territory, which as superior lord of the kingdom he might be called upon to attest and confirm; but the greater part by far are in Wessex, though most of them are in the first or second year of his reign, when by the common account the whole of England was under his immediate government. The lofty titles he assumes in his charters are borrowed from the inflated and ostentatious language of his predecessors<sup>1</sup>, and afford no indication of the extent either of his or of their dominions. The same style is retained after the dismemberment of his empire. If we were to believe such lying chronicles of the power and dignity of our ancient kings, Eadwig in the last year of his reign was still “Angol-Saxonum rex”—“Anglorum atque Bryttanorum monarchus”—“Anglorum cæterarumque gentium in circuitu persistentium gubernator et rector”—“Basileus Anglorum.” In his charters, his brother Eadgar commonly signs himself “frater regis”—“clito”—“indoles clito”; but in one instance, of a grant in Worcester, he styles himself “regulus,” which was the appellation of a subordinate king. I have met with no charter of Eadwig, attested by Eadgar, of a later date than 956, except one, which is 957.

As a general remark it may be worth observing, that no fallacy could be greater than to form an estimate of the real power or extent of territory enjoyed by our Saxon princes from the language of adulation used in their charters. Æthelbald, king

<sup>1</sup> In a charter of 956, he styles himself “Ego Eadwig, largiflua Summi Tonantis rex Anglorum, et totius Britanniae provinciarum providentia.” Kemble’s *Codex Diplomaticus*, vol. ii. p. 336.—ED.

of the Mercians, calls himself in one of his charters "Britanniæ rex;" and Offa, his successor, repeatedly styles himself "rex Anglorum." Æthelstan, though pretending only to be paramount lord of the island, calls himself "rex totius Albionis." And Eadmund, the father of Eadwig, who was compelled at one time to yield to his Danish competitor the whole of England to the north of the Watling Street, is described in the barbarous language of his time as one "qui regimina regnorum Angul-Saxna et Northymbra, Paganorum Brittonumque, septem annorum intervallo, regaliter gubernabat."

Eadwig has been abused as an irreligious prince, and stigmatized as a plunderer of the Church. It is true he took part with the secular priests against the monks; and it is alleged, that the clergy he protected were remiss in their discipline, inattentive to their religious duties, proud and insolent in their manners, and grossly immoral in their practice. It is particularly urged against them, that, in defiance of the canons of the Church, they publicly cohabited with women, whom they called their wives.

The truth of this last assertion cannot be denied. Though the marriage of priests and deacons was strictly prohibited by the laws of the Church, there is the clearest evidence, that not only many of the English clergy lived at that time, and long afterwards, in the state of marriage, but that they justified their conduct by the example of St. Peter and of other holy men. The biographer of St. Oswald informs us, that the youth of his hero was passed in the mynster at Winchester, and adds with a sneer, "in diebus illis non monastici viri erant in

“ regione Anglorum, sed erant *religiosi et dignissimi*  
 “ *clerici*, qui tamen thesauros suos, quos avidis ac-  
 “ quirebant cordibus, non ad ecclesiæ honorem, sed  
 “ suis dare solebant uxoribus. Cum his mansita-  
 “ bat pius adolescens, velut Loth in Sodomis.”  
 The marriage of mynster-priests, and the use to which they applied their wealth described in this quotation, there is no reason to question; but the last comparison might have been spared, as more suitable to the chronicler of the Church, when the canons enjoining celibacy were rigorously enforced.

So general was marriage in the English church, and so obstinately were the clergy attached to the indulgences of the married state, that Ælfric, in the following century, while he remonstrates against the practice in the strongest terms, confesses in the name of the bishop, for whom he wrote a pastoral charge, that it was hopeless to put a stop to it. “ We cannot compel you,” he says, addressing himself to the clergy, “ but we admonish you to  
 “ keep your cleanness as the servants of Christ  
 “ ought to do.” “ To such a wretched pass are  
 “ we arrived,” he says, “ that many think it no  
 “ sin for a priest to live as a married man.” “ The  
 “ canons that prohibit the company of women seem  
 “ grievous to you,” he adds, “ because ye are so  
 “ habituated to your vices, that ye think it no of-  
 “ fence when ye cohabit with women like laymen<sup>1</sup>.”  
 It is hinted by Wulfstan, and confirmed by a council in the time of Æthelred II., that it was the practice of the clergy, when tired of their wives, to repudiate them and marry others; and it was pro-

<sup>1</sup> Ancient Laws and Institutes of England, p. 458. Fol. edit.



bably with reference to this abuse, that in the law of the Northumbrian clergy a curse is denounced against the priest who deserts his "quean" and takes another<sup>1</sup>. This northern legislator, whoever he may have been, seems wisely to have thought, that if he could not eradicate, he ought at least to mitigate the evil.

Nor are the other charges against the secular clergy entirely without foundation. If we had no other evidence for their vices than the declarations of the monks we might suspend our judgment. The monkish writers, to say the least of them, are prone to exaggeration, and in this instance they had to vindicate the honour and interests of their order against a body of men whom they had supplanted. No further proof, indeed, could be required of the corruption and profligacy of the secular clergy, if the discourse attributed to Eadgar by the abbot of Rievaulx, had been actually delivered in a general council of the English church. But I agree with Dr. Lingard in considering this discourse as the declamation of some rhetorician<sup>2</sup>. It is a bitter and not ineloquent satire on the vices of the clergy, founded apparently on the Canons and Penitential of Eadgar. I have subjoined in a note a specimen of the style and insolence of the invective<sup>3</sup>. As an

<sup>1</sup> Ancient Laws and Institutes of England, p. 418. Fol. edit.

<sup>2</sup> History of England, i. p. 228, *note*, edit. 1837.

<sup>3</sup> *Taceo quod non est in illis corona patens, nec tonsura conveniens; at in veste lascivia, insolentia in gestu, in verbis turpitudine, interioris hominis produnt insaniam. Præterea in divinis officiis quanta sit negligentia . . . Dicam dolens quomodo diffluant in comensationibus, in ebrietatibus, in cubilibus, in impudiciis, ut jam domus clericorum putentur prostibula meretricum,*

historical document it is of no value. Æthelred, abbot of Rievaulx, by whom it was published and possibly composed, died in 1166.

But, after rejecting this evidence and setting aside the invectives of the monks, as the loose declamations of an adverse faction, unexceptionable proof remains, that, for a century before the Conquest, the English clergy were degraded by many gross and immoral habits, unbecoming their station, and unsuitable to the sacred calling they professed. The upper ranks among them appear to have been vain and ostentatious, idle and frivolous, dissolute and luxurious. The inferior classes seem to have been scandalous in their lives, coarse in their manners, shameless in their conduct, greedy after gain, and more intent on worldly business than on spiritual concerns: this we collect from the Canons and Penitential of Eadgar, and from the writings of Ælfric, who, though a monk, is worthy of credit on this point, as he descends to particulars, and composed his works, not in the spirit of controversy, but at the desire of his superiors, for the general reformation of the Church.

From these authorities we learn, that intemperance was a vice to which the clergy were grievously addicted. They are cautioned against drinking to excess, lest they should be suddenly called upon to perform baptism or administer the eucharist, when not in a condition to discharge those duties. They are admonished not to frequent taverns and alehouses, not to indulge or encourage others in

*conciliabulum histrionum, ibi aleæ, ibi saltus et cantus, ibi usque ad medium noctis spatium protractæ in clamore et horrore vigiliæ. Bonifacii Ep. ad Cuthbertum, ap. Wilkins, Conc. i. p. 247.*

drinking, not to be too ready in accepting invitations to convivial meetings, not to court poetic inspiration by potations of ale, nor to exhibit themselves in company as gleemen. It was their duty to administer spiritual comfort to the sick, and after death to watch over the body till it was committed in due form to the earth, praying and recommending the soul to God. But they are enjoined not to make merry over the dead, nor repair to a corpse till they are invited: and when called, to forbid the heathen songs and outcries of the laity, and neither to eat nor drink beside the corpse, lest they be contaminated by the heathenism there practised. In another passage they are reproved for rejoicing over the dying, and gathering, unbidden, about a corpse, like greedy crows when they spy a carcase. It is their duty to minister to the persons belonging to their church, but they are directed not to quit their parish to attend a corpse, unless specially invited. Their love of gain seems to have been of a piece with their gluttony and intemperance. They are enjoined not to dispense their sacraments for money, not to defraud one another of their dues, nor to entice away the parishioners or servants of another mynster. Every priest was obliged to learn some handicraft trade, but he was forbidden to exercise it for gain, and strictly prohibited from being a huckster or trader. The propensity of the clergy to neglect the proper duties of their station and intermeddle in secular affairs is frequently animadverted on and censured. It seems to have been a great object of their ambition to attain the situation of reeve (gerefa), that is, of land-steward and country justice. They are



desired not to be solicitous for such employments, and, if appointed to them, not to be harsh and rapacious in discharging the office of steward, nor to be stirrers up of strife and promoters of litigation in their capacity of justice. They are enjoined to keep out of feuds and frays, to avoid quarrels, to abstain from profane swearing, and to discourage that irreverent practice in others. From war, battle, and marriage, from wife, and world's strife, they are earnestly and repeatedly warned. Their church is called their lawful spouse, and their marriage stigmatized as adultery<sup>1</sup>.

The levities and amusements of the higher clergy are treated with the same unsparing hand that chastens and exposes the grosser vices of their humbler brethren. Hunting, hawking and gaming, which were probably the recreations of the superior orders in the Church, are declared to be inconsistent with their sacred functions. They are required to be decent but not ostentatious in their apparel, not to bedizen themselves with gold, nor to have rings glancing on their fingers; not to appear in a layman's frock nor dress like a woman; to wear their priestly garments in becoming order, and not to cover their tonsure, as if ashamed of it, but to have it properly and becomingly shaven. When not employed in their clerical duties they are desired to attend to their books, and not to run after sights and shows, nor waste their time in idle converse with women<sup>2</sup>.

<sup>1</sup> See Ælfric's Canons and Pastoral Epistle in the Ancient Laws and Institutes of England.—ED.

<sup>2</sup> Ibid.

The penances enjoined to priests of every degree for homicide, theft, perjury, false witnessing and illicit commerce with the other sex, show clearly that the commission of these offences was not confined to the laity.

But if, on the strength of this evidence, we pronounce against the clergy protected by Eadwig from Dunstan and the other reformers of the age, what shall we say to the intimations given us of the same or even of more scandalous vices in the Anglo-Saxon church, before the ravages of the Danes had relaxed its discipline and corrupted its purity? When we look into the Penitentials of Theodore, who was archbishop of Canterbury in the seventh, and of Egbert, archbishop of York in the middle of the eighth century<sup>1</sup>, we meet with a long list of penances enjoined to the clergy, for transgressions of a blacker die and more heinous character than those attributed to the secular canons by the bitterest of their adversaries. Not to speak of disgusting vices, not fit to be named, which appear to have prevailed at that time, in every possible form, among ecclesiastics as well as laymen, we find enumerated among the sins of the clergy, homicide, theft, perjury, and every sort of low debauchery, with an adequate penance prescribed for each, corresponding to the nature and degree of the crime and to the rank of the offender. We may judge of the excess to which intemperance in drinking was carried by the Church, from a regulation which enacts, that a monk should fast thirty days and a mass-priest forty, when either of

<sup>1</sup> See these Penitentials in *Ancient Laws and Institutes*.—ED.

them happened to indulge in drinking till he vomited. Nor were the higher clergy more decorous in their morals than their inferiors. "We hear "with sorrow," says the Anglo-Saxon apostle of the Germans, "that drunkenness is very common "among the English clergy; and that bishops, "instead of correcting this vice in others, indulge "in it themselves, and compel their guests to follow their example *porrectis poculis majoribus*<sup>1</sup>." "It is reported of some bishops," says Beda, in a letter to his metropolitan, "that they have no "person about them of piety or purity of manners, "but live in the midst of jovial companions, who "divert them with their jests and tales and merriment, preferring feasting and drinking and other "amusements of a secular life to pious contemplations and prayer." "There are many townships "and hamlets in Northumberland," says the same author, "where a bishop has not been seen for "many years, nor even a teacher of the word, to "expound to the people their creed, or explain "to them the difference between right and wrong; "and yet there is not a place," he adds, "however remote, where the dues of the Church are "not rigidly exacted<sup>2</sup>." Some of the exactions thus unsparingly levied seem to have been unlawful; for he concludes with the observation, "*sicque "fit, ut episcoporum quidam non solum gratis non "evangelizent, vel manus fidelibus imponant; verum etiam, quod gravius est, accepta ab auditoribus suis pecunia, quam Dominus prohibuit,*

<sup>1</sup> Bonifacii Epistola, apud Wilkins, Conc. i. p. 93.

<sup>2</sup> Bedæ Epistola ad Egbertum Antistitem.



“ opus verbi, quod Dominus jussit exercere, contemnant.”

Nothing can be more certain than that all the members of the Anglo-Saxon church, above the degree of a subdeacon, were prohibited from marriage; and however much that prohibition was disregarded, there is no reason to doubt, that, in the early age of the Church, it was strictly enforced. But it was easier to proscribe marriage than to maintain continence or inspire purity and sanctity of manners. The frightful depravity of the clergy of those times is attested and illustrated by the numerous and minute regulations to repress its excesses. On such a topic it is impossible to enlarge, or to enter into details. It is enough to refer to the Penitential of Ecgbert already cited, and to the tract attributed to Beda, “ De Remediis Peccatorum.” All the horrors which the most depraved imagination has been able to suggest, will there be found gravely enumerated among the sins for which the clergy are to do penance. It is possible that excesses may be described that never existed but in the mind of the confessor; but where there is much smoke there must be some fire. Had the purity of the Saxon church been such as we have seen it represented, it can hardly be supposed that an archbishop of York would have raked together such a mass of ordure for the edification of his clergy, to direct them in the daily discharge of their duties.

Nor were these vices confined to the secular clergy. Irregularities, the most repugnant to the purity of a monastic life, were not unknown within

the precincts of the cloister. Nunneries appear to have been converted into brothels by some of the Saxon princes, and infanticide was no unfrequent consequence of this prostitution. Boniface reproaches Æthelbald of Mercia with his libertinism, and adds, “*quod hoc scelus maxime cum sanctimonialibus et sacratis Deo virginibus per monasteria commissum sit*<sup>1</sup>.” Other Saxon princes were not more exemplary than Æthelbald. We are told that Osred of Northumberland and Ceolred of Mercia passed their lives in “*stupratione et adulterio nonnarum*.” Monasteries had so quickly departed from the original strictness of their institution, that in 747 the Council of Cloveshoe found it necessary to declare, that they should not be turned into places of amusement for minstrels, harpers, fiddlers and buffoons; and prudently recommended, that laymen should not be admitted freely within their walls, “*ne materiam aliquando reprehendendi inde sumant, si quid intra claustra monasterii aliter quam decet videant*.” It appears, indeed, from the celebrated letter of Beda to archbishop Ecgbert, that before the death of that venerable presbyter, there were innumerable monasteries in Northumberland useless, as he expresses it, both to God and man. Nor is it correct to say, that the

<sup>1</sup> Bonifacii Ep. ad Æthelbaldum, in ejusd. Opp. A part of this letter is given by Malmesbury. Boniface further says, “*Audivimus præterea quod optimates pene omnes gentis Merciorum tuo exemplo legitimas uxores deserant, et adulteras et sanctimoniales constuprent*” . . . . “*Chelredum, prædecessorem, stupratorem sanctimonialium, et ecclesiasticorum privilegiorum fractorem, splendide cum suis comitibus epulantem, spiritus malignus arripuit*.”—ED.

animadversions of Beda, and the injunctions of the Council of Cloveshoe, relate exclusively to what were called secular monasteries. These institutions are, no doubt, mentioned and reprobated by both, and considered by Beda as the disgrace and reproach of the kings and prelates by whom they had been established and confirmed. But the exhortations of the Council are general and not confined to a particular class of monastic foundations; and the unfavourable picture drawn by Beda of the Northumbrian convents precedes the history he gives of the secular monasteries, concerning which he has left us so curious and authentic, and, for the light it throws on the common tenure of landed property among the Saxons, so valuable an account.

But if such was the lamentable state of the Anglo-Saxon church in the time of Beda and Egbert, when are we to look for its age of purity? Beda refers us to the time of Theodore, and had we a similar reference from Theodore, he would probably have sent us back to Austin's time. That Theodore was a learned and devout, though a stern and somewhat despotic, prelate, we learn from the remnants of his Life. Of the character and manners of his age we know little but what we learn from his Penitential, which exhibits the grossness and rudeness of the barbarians he was sent to civilize.

To return from this fruitless search after the golden age of the Church, which appears to recede like the horizon, at our approach, we may rest assured, that, if the manners of the clergy were coarse and their morals profligate before the Danish invasion, their vices were not lessened, nor their



discipline improved by the ravages of those barbarians, or by the license necessarily engendered in the course of a long and destructive war, that laid waste every part of the kingdom. It was probably, therefore, not without cause that Dunstan and his associates attempted a general reform in the Church; and though we may condemn the violence and harshness of those measures, we must own their intentions to have been good, and applaud the courage and perseverance with which they pursued their object. If Eadwig, in opposing their schemes, was actuated solely by his dislike of Dunstan, he was much to blame. The monks appear to have been more learned men, more regular in their lives, and more austere in their duties than the clergy to whom they were opposed. But they were intruders and innovators on what was then established, and in resisting their enactments, Eadwig was upholding the existing institutions of the realm. Like many princes at the era of the Reformation, he might have thought it possible to correct the vices of the clergy, without expelling them from their benefices, or compelling them to embrace a rule which had not been enacted for them at the time of their ordination.

We are told, indeed, that Eadwig, not content with being the protector of the established church, became the persecutor and spoiler of the monks. "*Regis edicto,*" says Osbern, "*omnes monasticæ religionis ecclesiæ suis rebus spoliabantur.*" But, when we inquire into the particulars of this accusation, we find from a contemporary author, that the only monks at that time in England were those of

Glastonbury and Abingdon: "Hactenus ea tempestate non habebantur monachi in gente Anglorum, nisi tantum qui in Glastonia morabantur et Abbendoniam." These two monasteries, we are told, were dissolved.

That Dunstan, abbot of Glastonbury, was expelled from that monastery through the means of Eadwig, is most certain; but that the abbey of Glastonbury was dissolved by that prince, is most incorrectly stated. On what pretext Dunstan was deposed from his office of abbot we are not informed. Adalard, one of his biographers, tells us shortly, that "exilio pro justitia ascriptus mare transiit;" and as this expression is used by a panegyrist of Dunstan, Dr. Lingard translates *pro justitia* "for righteousness sake." Whatever may have been the motives for the persecution of Dunstan, we may be assured that his righteousness was not the pretext assigned for it; and, therefore, we must look elsewhere than in Adalard for the grounds of his exile, or translate *pro justitia* in a sense more congenial to the Latinity of the times. In the middle ages the word *justitia* has commonly a reference to the administration of justice, and among other meanings, it signifies a mulct, or fine, imposed by a court of law. That judicial proceedings were instituted against Dunstan is not asserted by any ancient authority. His contemporary biographer informs us, that he had been intrusted by Eadred with his treasures and other valuable effects, and that when ordered to deliver them back by that monarch, on his death-bed, he did not arrive at court till after the king's decease. Osbern adds,

that he was sent for by Eadred, to be the witness and executor of his last will ; and Wallingford informs us, that though he arrived too late to see the king alive, “*omnino quod regem noverat præcepisse prosecutus est ;*” by which I understand that he disposed of the treasure and other effects committed to his care, according to the private directions he had previously received ; or from the knowledge he possessed of the king’s intentions. It would seem that Eadwig was not satisfied with this distribution. Wallingford further tells us, that, as keeper of Eadred’s treasures, Dunstan had been always “*suspectus Eadwino (Eadwio), sub cujus suspicionis obtentu,*” his property was sequestered ; but he does not say there was any judicial process instituted, antecedent to the sequestration. It is perhaps, therefore, on insufficient ground that modern historians have asserted, that Dunstan was accused of malversation in the management of the funds committed to his custody. This contemporary biographer is content with informing us, that having incurred the king’s grievous displeasure, and mortally offended a lady who had great influence over Eadwig, he was assailed by a clandestine conspiracy in his convent, betrayed by those who ought to have been most forward in his defence, and deserted even by his pupils, “*quos ipse teneros nectareo dogmate nutriebat.*” Deprived of his rank and property by these machinations, he was induced to quit the kingdom, out of consideration for his friends, whose charity he prayed ; and whose compassion to him in his distress drew upon them the severe indignation of the king.



It will naturally have been asked, of what private property could Dunstan, a monk, have been possessed, which it was in the power of his enemies to sequester? Poverty, implying a complete and absolute renunciation of all private property whatsoever, was the characteristic feature that distinguished a regular from a secular life. So clear in this point was the Saxon law, that a mynster-monk could neither demand nor contribute to *fæhðbôt*<sup>1</sup> (compensation for the deadly feud). When he submitted to *regol-lagu* (monastic law), he withdrew from *mæg-lagu*<sup>2</sup> (the law of kindred). What then can be meant by saying of the enemy of Dunstan, that "*omnem suppellectilis sui substantiam suis legibus subjugavit?*" The answer is by no means clear. It may have been the property of Eadred, the "*optima quæque suorum suppellectilium,*" which had been intrusted to Dunstan and had remained in his custody at the death of that monarch. It may have been the furniture of the monastery, or the ornaments of its church, over which, as abbot, he retained the control.

But, whatever injustice may have been committed against Dunstan, Glastonbury was not dissolved by the loss of its abbot. Ælfsige was appointed his successor, and instead of being the spoiler, Eadwig stands recorded among the benefactors of that monastery. In the *Monasticon* will be found the grants which he made to Glastonbury and its abbot, amounting, with those made by his servants, to near sixty hides of land.

<sup>1</sup> Ancient Laws and Institutes, pp. 147, 155.

<sup>2</sup> Ibid.

The fortune of Abingdon was still more favourable. Æthelwold, abbot of Abingdon, the friend of Dunstan, though a determined champion of the monks, and afterwards the instrument of their introduction by force into Winchester, not only retained his office under Eadwig, but so successfully cultivated the good graces of his sovereign, that whatever he solicited for his monastery, whether in confirmation of its privileges or increase of its possessions, was cheerfully granted to him. The donations to Abingdon in the time of Eadwig were splendid and numerous. His own immediate grants to our Lady of Abingdon, to St. Bennet, the patron of monks, and to the abbot Æthelwold, amounted to fifty hides ; and those made by his servants, with his consent and approbation, exceeded three hundred and forty. In the very last year of his reign he conferred on Abingdon a charter in the amplest form, confirming all its former privileges and possessions, and giving permission to the monks, on the death of their abbot Æthelwold, to elect his successor “ *secundum regularia beati Benedicti instituta.*” So little truth is there in the assertion, that he dissolved the abbey of Abingdon and expelled its monks.

Eadwig was not less bountiful to other churches and monasteries than to Glastonbury and Abingdon. It would seem, indeed, that the bitterness of the monkish historians against his memory, was less the result of any aversion or indifference he showed to their order, than of the protection he afforded to the secular clergy from their encroachments and aggressions. The records of many of

his grants must have perished ; but among those that remain, we find donations to the amount of a hundred and sixty-five hides to the nunnery at Wilton, of ninety hides to the convent at Shaftesbury, of seventy hides to St. Peter's at Bath, of seventy-four hides to the cathedral of Chichester, and of twenty hides to the see of York, besides grants of a smaller extent to Worcester and Evesham. Even Malmesbury, while deploring the profanation of the monastery from which he derives his appellation, converted, as he pretends, by Eadwig into a stable for canons<sup>1</sup>, owns the liberality of that prince to St. Aldhelm, its patron saint, in the gift of an estate very commodious for his servants, both from its size and from its vicinity to the convent. The praise of the estate was not unmerited. It consisted of fifty hides, and lay within a mile of the abbey<sup>2</sup>.

How far the general charge of rapacity, violence and injustice against Eadwig is founded in truth, we shall find it more difficult to determine. His accusers are his bitterest foes, and from the specimens already given of their want of accuracy and fidelity, little credit would seem due to the vague and general declamations in which they indulge against him. The contemporary biographer of Dunstan informs us, that on the death of Eadwig, his brother Eadgar restored that abbot to his former dignity, "*similiter et atavam suam et nonnullos alios quos frater ipsius prædari præcepit.*" That

<sup>1</sup> *Stabulum clericorum.*

<sup>2</sup> For proofs of Eadwig's bounty to the Church, see his charters in *Cod. Diplom.* vols. ii. and v.—Ed.



some persons may have been unjustly deprived of their possessions in the time of Eadwig, either by open violence or iniquitous judgments, is not impossible; but that his government was not on the whole tyrannical, appears from the testimony of Ethelwerd, his contemporary. It is curious to trace the progress of monkish exaggeration. The *nonnullos alios* of the first biographer of Dunstan is swelled by Osbern into “optimum quemque re-  
 “bus exspoliare, locupletes proscribere, exhære-  
 “ditare, ecclesias detrahare religioni, multiplices in  
 “civitatribus exactiones exercere.” The only specific charge against Eadwig is his supposed treatment of his grandmother Eadgifu, who is said to have been “despoiled” by him “of her riches and  
 “patrimony, and reduced to a state of indigence  
 “and privacy.” A charter of that princess<sup>1</sup> is quoted in confirmation of this charge. On the death of Eadred, says the charter, “was Eadgifu  
 “forcibly deprived of all her estate.” But it is not said or insinuated that this violence was committed by the authority or direction of Eadwig. It rather seems, from the tenour of the charter, to have taken place before he was elected king. From the charter it may be collected, that Eadgifu, though a pious lady and benefactress of the Church, had been all her lifetime engaged in lawsuits, that she had been enriched with confiscated property in the time of her husband; that, on the accession of her stepson, Æthelstan, she had been compelled to give back to one Goda the title-deeds of his estate, reserving a small por-

<sup>1</sup> Lye's Appendix; Cod. Diplom. ii. p. 387.

tion to herself, which she retained during the reigns of her two sons ; that on the death of Eadred she was ejected from her lands, that her grandson Eadwig was persuaded by the sons of Goda that they had the best right to their father's estate ; and that they kept possession of it till the accession of Eadgar, when it was restored to her. This is the story told by Eadgifu herself, without the slightest censure or reflection on Eadwig. That she was treated by him with harshness or reduced to privacy, is at least doubtful. In the last year of his reign her name appears as a witness in confirmation of his ample grant to Abingdon and its abbot.

We now proceed to that part of the history of Eadwig which has chiefly excited the interest, and still divides the opinions, of posterity.

His enemies impute the misfortunes of his reign to his connexion with a lady ; but of the nature of that connexion they have left us two, if not three, different and inconsistent accounts.

The question at issue is, whether the lady, to whose company he retired on the evening of his coronation, was his wife or mistress. For it is plain, from the account of Malmesbury, that the woman, from whom on that occasion he was forcibly torn by Dunstan, is the same person who was afterwards separated from him by Oda, banished by that prelate, and, on her return from exile, cruelly murdered by her enemies.

As early as Florence of Worcester, who flourished under Stephen, it appears there were two stories on this subject. That historian mentions both, without intimating which was most worthy of

credit, and from his silence it may be inferred, that even at that time it was uncertain which ought to be believed. But if a doubtful story of the tenth century was seriously told in the twelfth, and could not then be satisfactorily cleared up, what chance have we now of arriving at the truth without additional documents to assist us? In a matter of so much uncertainty, and, let me add, of so little importance, may not men espouse different sides, without being abused for "practising foul acts to blacken the characters of good men, whom past ages have viewed with veneration?" Must an historical fact before the Conquest be judged with reference to the religious animosities of the present day? Is the *odium theologicum* so implacable as after centuries to dig up its victims from the tomb, merely to insult their ashes? After all, I see no reason why the reputation of Ælfgifu is not as much to be considered as that of Dunstan. If she was an honest woman and unjustly punished by Oda, the restoration of her fame is due to her innocence, and the only possible atonement for her persecution.

According to Florence of Worcester, archbishop Oda separated Eadwig and Ælfgifu, on account of consanguinity. They must therefore have been married, though uncanonically united. If he lived with her in adultery, having another wife, they must have been separated for their adultery, and not for their relationship. The absence of consanguinity would have been no excuse for adultery, nor would adultery have required the aggravation of incest. Separation for consanguinity implies



her marriage with Eadwig ; and his marriage with her, though within the prohibited degrees, excludes the possibility of another wife. Here, then, are two editions of the story, as old at least as the time of Florence of Worcester, and till the truth can be ascertained between them, let Catholics take the one and Protestants adopt the other, without losing their temper in giving hard names to their opponents.

The earliest and best historical authority for the marriage of Eadwig and Ælfgifu is the Saxon Chronicle. That invaluable monument of our early history informs us, that archbishop Oda separated Eadwig and Ælfgifu because they were too near akin, the word “*totwæmde*,” used to describe their separation, being the term employed on other occasions in the same chronicle to express the divorce of husband and wife. The words referred to are found in a manuscript which appears to have been written in 1016, within less than sixty years after the fact it records, and may possibly have been taken from some still older manuscript.

Malmesbury is our next historical evidence on this side of the question. After describing Eadwig as a handsome but profligate youth, he adds, “*proxime cognatam invadens uxorem, ejus forma deperibat.*” This sentence has been variously tortured by controversialists ; but, in its plain and obvious interpretation, it seems to import, that having unlawfully taken to wife a near relation, he was desperately in love with her beauty. In confirmation of this version it may be remarked, that when Malmesbury afterwards relates the separation

of the parties, he describes it by the word “repudiare,” which implies they were either married or betrothed, and could not with propriety have been used, if their connexion had been founded on open and avowed adultery. In further corroboration it may be urged, that the monk of Ramsey, who manifestly copies his account of this transaction from Malmesbury or from some common source, says in unequivocal terms of Eadwig, “cujusdam cognatæ suæ, eximiæ speciei juvenculæ, illicitum invasit matrimonium.” It is no objection to this translation, that Malmesbury bestows on the lady the appellation of “ganea,” “pellex” and “meretricula.” Considering the marriage to have been unlawful, he must have regarded her as the concubine of Eadwig, and detesting her as the enemy of Dunstan, he was not likely to be chary in his epithets.

It is of importance to remark, with reference to the subsequent history, that according to Malmesbury, it was through the influence of Dunstan with Oda, that this lady and Eadwig were separated. “Dunstanus . . . lascivientem juvenem violenter de cubiculo extraxit, et *per* Odonem archiepiscopum, pellicem repudiare coactum, perpetuum sibi inimicum fecit.” The enmity of the king is not ascribed solely to the rudeness and violence of Dunstan on the evening of his coronation, but to the subsequent exertions of the abbot, through Oda, to compel him to repudiate his kinswoman. The same account is given, and as usual, in terms still more unequivocal, by the monk of Ramsey. After relating the marriage of Eadwig with his kinswoman,

in the words formerly quoted, he adds, “*pro cuius* “*copula a Sancto Dunstano redargutus, et Sancti* “*Odonis auctoritate per ipsum ad repudium mulieris est coactus.*” It was the authority of Oda, as archbishop, that compelled Eadwig to submit to the divorce; but it was at the instigation and through the influence of Dunstan that Oda undertook and accomplished it.

The conduct of Dunstan may have proceeded from a conscientious regard to his duty, though in the warmth of his zeal he forgot, like Knox, the respect due to his sovereign, and in the austerity of his principles he disregarded the calamities prepared for his victim. But it cannot be denied that his violence was calculated to offend the king, and his perseverance in urging the divorce was not unlikely to draw on him the indignation of the lady. We are not therefore surprised to find in Malmesbury, that it was “*propter pellicis consilium . . . .*” “*mulierculæ unius seductus illecebris,*” that Eadwig was instigated to the ruin of Dunstan. It is not wonderful that a person, whom the abbot sought to deprive of her rights as a wife and of her rank as a queen, should have been the enemy of her persecutor. That she fomented dissensions in his convent, that she stirred up his own pupils and monks against him, that she procured his expulsion from Glastonbury and obtained the disposal of his property when sequestered, that she deterred his timid friends from succouring him in his distress, and drove him at length into exile, was not unnatural in her situation; nor did it require, as Osbern imagines, the immediate agency and co-operation



of the devil to excite her to such vengeance. If it was her intention, as his biographers affirm, to have seized him and put out his eyes, her cruelty, though it may lessen our pity for her fate, was mercy in comparison of the treatment she was doomed to receive from his friends.

It does not invalidate the preceding accounts, that the separation of Eadwig from his kinswoman was not effected till after the banishment of Dunstan. Eadwig resisted the divorce. Oda was compelled to suspend him from the rights of a Christian man, in order to enforce his submission. Still he appears to have been refractory, and to have refused to abandon his kinswoman. The *repudium* was at length effected by force ; the lady was seized by Oda with a band of soldiers. Her person secured, she was branded in the face, as a mark of ignominy, and banished to Ireland. Returning from exile, after the recovery of her beauty, she fell into the hands of her enemies, by whom she was ham-strung and left to expire in lingering tortures. The whole of these particulars are not related by Malmesbury, but in the following short passage we have a summary of her story : “ Eadwinus . . . pontificis (Odonis) animos irritavit, “ ut et ipsum a Christianitate suspenderet, et ganeæ “ pellicatum, primo expulsione, post succisura poplitis interromperet.”

The name of the person thus repudiated is not given by Malmesbury ; she is merely designated as the kinswoman of Eadwig, and stigmatized with the epithets of “ ganea,” “ pellex ” and “ meretricula.” But we know from the Saxon Chronicle,

that it was Ælfgifu, who was divorced from Eadwig by Oda on account of their consanguinity. It was Ælfgifu, therefore, to whose company Eadwig retired on the evening of his coronation ; nor is there any other woman mentioned by Malmesbury, in his History or in his Lives of the Bishops, as having been present on that occasion. The dissolute scene described by the biographer of Dunstan, was therefore either unknown to the authors from whom he compiled these works, or rejected by them as fabulous. If noticed by him in his Life of Dunstan, it only confirms what a slight perusal of our monkish historians will satisfy any one to be the case, that in compiling from their predecessors, they merely changed the language and varied the phraseology of the work before them, without examining into its truth, or even comparing it with accounts of the same transaction, which probably at some former period they had themselves compiled from a different original.

The monk of Ramsey, whose words have been already cited, may be considered as a commentary on what is doubtfully or obscurely expressed in Malmesbury. In words that admit but of one construction, he admits the marriage of Eadwig with his kinswoman, and ascribes their divorce to the influence of Dunstan with Oda.

Wallingford has injudiciously blended in his narrative two inconsistent stories. He begins with a description of the coronation scene, in the coarse and disgusting language of Eadwig's most inveterate enemies. The women, to whose private converse the king retired on that occasion, he repre-

sents as a mother and her daughter, and tells us, that Dunstan and Cynesige, the messengers sent to bring him back to the coronation feast, found him between these women “*alternatim eas lascive et pudende palpitantem.*” He calls the mother Ethelgiva, and describes one of the women (though from an hiatus in the manuscript used by Gale, it is uncertain which), as breaking out into violent abuse of Dunstan and afterwards instigating the king against him; but in the subsequent part of the story it is the queen he presents to us as the open enemy and active persecutor of that abbot: “*regis iram sensit erumpentem et reginæ manum, exterius et aperte flagellantem.*” The friends of Dunstan, he informs us, from apprehension of increasing the enmity of the king and queen, were afraid even to advise him in his extremity: “*noti ejus et amici regis et reginæ malevolentiam metuentes incurrere, in consiliis dandis ei defuerunt.*” That the word *regina* in these passages is to be translated *concubine*, is a suggestion that nothing but the heat of controversy could have inspired. The truth seems to be, that Wallingford, finding in one account that the queen was the persecutor of Dunstan, and reading in another the disgusting picture of the coronation scene, adopted both stories and mixed them up in the same narrative, without perceiving they were utterly inconsistent with each other.

There still remains to be mentioned an evidence of the marriage of Eadwig with Ælfgifu of so decisive a nature, that, unless it be a forgery of the monks, there can be no appeal from its authority.



A manuscript history of Abingdon, preserved in the British Museum, contains, among other documents relating to the abbey, the transcript of a deed of exchange between Byrthelm, bishop of Wells, and Æthelwold, abbot of Abingdon, attested, among other witnesses, by Ælfgifu, the king's wife, and Æþelgifu, the king's wife's mother. Mr. Turner, who had seen an abstract of this deed in another manuscript of the same collection<sup>1</sup>, seems to have entertained doubts of its authenticity, but on what grounds I am at a loss to conjecture. The manuscript in which it is found seems to have been written in the time of Richard I., and, as far as I have compared it with originals still extant in the Museum, I have found the transcript quite correct. The deed is in Saxon, the letters partly Saxon and partly Roman, and of the following tenour :

“ This is the agreement which bishop Byrthelm  
 “ and abbot Æthelwold have made concerning the  
 “ exchange of their lands : that is to say, the bishop  
 “ gave to the church at Abingdon in perpetual in-  
 “ heritance the hides at Cenintun, and the abbot  
 “ gave seventeen hides at Crydanbricge to the bi-  
 “ shop for ever, for his life and after his life ; and  
 “ they also exchanged all things (on these lands),  
 “ both live stock and other things ; and this was  
 “ (done) with leave of King Eadwig. And these  
 “ are the witnesses—Ælfgifu, the king's wife, and  
 “ Æþelgifu, the king's wife's mother, Bishop Ælf-  
 “ sige, Bishop Osulf, Bishop Cænwald, Ealdorman  
 “ Byrhtnoth, Ælfheah, the king's disc-thegn,  
 “ Eadric his brother.”

<sup>1</sup> See both documents in Codex Diplomaticus, v. p. 378.—ED.

It appears from this instrument, that Ælfgifu was the king's wife, and Æthelgifu her mother; that both were resident at the same time in the king's court; and that both subscribed as witnesses to an agreement between the bishop of Wells and the abbot of Abingdon, with three bishops attesting the transaction. That Ælfgifu was considered all that time as the king's *pellex* or *meretricula*; that her mother was living in open adultery with the husband of her daughter, and that so scandalous and profligate a connexion was witnessed and connived at by so many devout and respectable men, we may pronounce to have been morally impossible. Æthelwold, one of the parties to the agreement, was afterwards made bishop of Winchester, at the recommendation of Dunstan, and has been since beatified by the church of Rome. The bishop of Wells, the other party, is described by the biographers of Dunstan as "mitis et modestus et humilis et benignus." In the reign of Eadgar he was thought worthy of the see of Canterbury, but appearing to that prince of a character too mild for the situation, he was sent back to Winchester, of which he had been appointed bishop on the removal of Ælfsige. Cœnwald, bishop of Worcester, is said to have been a man "magnæ humilitatis et monasticæ professionis." Ælfsige, bishop of Winchester, is reproached for his enmity to Oda, but is admitted to have been "regalis prosapiæ et egregiæ literaturæ." On the death of Oda he was translated to Canterbury by Eadgar. Malmesbury pretends he procured this appointment by bribery, but in the contemporary life of Dunstan there is no such

insinuation against his memory. Of Osulf I have found no memorials, except that he filled the see of Wilton for many years, and was placed in that situation by Æthelstan.

In confirmation of this transaction, and of the authenticity of the instrument that records it, I find in Domesday, Chenitun and Genetun in Berkshire enumerated among the possessions of Abingdon. Cridanbricge was probably an estate on the river Creden in Devonshire.

In opposition to the story that makes Eadwig married to his kinswoman, within the degrees prohibited by the Church, we have the account of Bridferth in his Life of Dunstan, and the annotations of Osbern and Eadmer, the biographers of Dunstan and Oda.

Bridferth, though younger than Dunstan, had seen and conversed with him, and must have written his Life before the death of Ælfric, archbishop of Canterbury, which happened in 1006. Osbern lived in the time of the Conqueror, and Eadmer flourished under his two sons.

According to Bridferth, Eadwig had been in the practice, before his coronation, of indulging in indecent familiarities with a woman of rank, though of profligate character, and her daughter, “*quas ille, ut aiunt, alternatim, quod jam pudet dicere, turpi palpatu et, absque pudore utriusque, libidine tractavit.*” By this shameless conduct, we are told, the mother hoped to entice the dissolute but inexperienced youth into a matrimonial connexion either with herself or with her daughter, “*per nefandum familiaritatis lenocinium sectando*



“inhærebat, eotenus videlicet quo sese vel etiam  
“natam suam sub conjugali titulo illi innecten-  
“do sociaret.” On the evening of his corona-  
tion, tired with the prolixity of the feast, he  
suddenly started up from table and withdrew to his  
private chamber, to enjoy the company of these  
women. His guests, and especially the primate,  
offended at his departure, despatched Dunstan and  
bishop Cynesige to fetch him back, with or without  
his consent, to the festive board. Bursting into  
the apartment where he had retired, they found  
him with his crown on the floor, “maligno more  
“inter utrasque velut in vili suillorum volutabro  
“creberrime volutantem.” Dunstan, after sharply  
reproving the women for their wickedness, laid  
hold of the king, dragged him by force from their  
apartment, and led him back to the convivial as-  
sembly he had quitted. At this unexpected act of  
violence or vigour, Æthelgifu, for so the worthless  
woman was called, darting a furious look at the  
abbot, exclaimed that he was too bold to force him-  
self in that manner into the king’s private chamber.

From that day forward, continues Bridferth, this  
impudent virago, like another Jezebel, never ceased  
to influence the king with her venomous breath  
against the abbot. To her influence with Eadwig  
it was owing that Dunstan was deprived of his sta-  
tion, and his property placed at her disposal ; that  
the monks of his convent and even his favourite  
pupils were stirred up against him ; and that the  
friends who from charity or compassion harboured  
him “injusto arbitrio criminantis fœminæ ejectum,”  
increased the fierce resentment of the king. Over-

whelmed by these calamities, Dunstan, after lingering for some time in the kingdom, in hopes that the heart of the king might be softened and his wrath assuaged, sought refuge in a foreign country; and hardly was he embarked, when messengers from the women arrived, with directions to put out his eyes, in case he was still found in the land.

Bridferth then proceeds to relate, that Eadwig having fallen into contempt for his folly and his preference of ignorant favourites over his wiser and more experienced counsellors, his subjects in the north rose against him, rejected his authority and chose his brother Eadgar for their king; that the kingdom was divided between the brothers “ex definitione sagacium,” the Thames being the boundary of their respective dominions; that Dunstan was recalled by Eadgar, and that Eadwig expiated his sins “misera morte.” But of the subsequent history and fate of the two women, who had so great a share in the disgrace of Dunstan, he says not a word.

Osbern in his *Life of Dunstan*, and Eadmer in his *Lives of Dunstan and Oda*, have borrowed from Bridferth their descriptions of the coronation scene, and in some respects they have heightened the indecent colouring of the original picture. “In *“turpes concubitus publice devoluta”* is the expression of Osbern in relating the situation in which Eadwig was found on that occasion; and Speed, mistaking this rhetorical flourish for a plain matter of fact, gravely assures his readers, that, according to the monkish reports of this king, “on the so-

“ lemne day of his coronation, *and in sight of his*  
“ *nobles*, as they sate in counsel, with shamelesse  
“ and unprincelike lust, he abused a lady of great  
“ estate and his neere kinswoman.” Eadmer like  
Bridferth ascribes to a matrimonial speculation the  
shameless profligacy of the two women ; and though  
he represents them as a mother and daughter, he  
plainly intimates, that each in her turn, and in pre-  
sence of the other, was a willing victim to the in-  
temperate desires of their youthful gallant. “ Suis  
“ blanditiis et nutibus illecebrosis pro posse operam  
“ dantes, quatenus unam illarum sibi in conjugium  
“ copularet. Ad quas ille impudico illiciti amoris  
“ desiderio fervens, indecenti amplexu, nunc hanc  
“ nunc illam, neutrius adspectum in hoc erubescens,  
“ destringebat.” That such a prelude should be  
expected to end in marriage seems a calculation too  
rash and extravagant for reality, and resembles  
more the dream of a recluse, unacquainted with  
the world, than the manœuvring of a profligate  
woman, hackneyed and experienced in its ways.  
That such a scene was actually exhibited, could have  
been credited or repeated by no one but a Saxon  
monk, polluted from the study of his penitential.

The behaviour of Dunstan, when he burst into  
the king’s apartment, the furious looks and fierce  
rebuke he bestowed upon the women, the angry  
reply to which one of them was provoked, her sub-  
sequent enmity to the abbot, his persecution and  
flight, are related by Osbern and Eadmer nearly in  
the same manner as they had been told by Bridferth.  
They both consider the women as the chief instru-  
ment of his disgrace ; but Eadmer dwells at greater



length on the dissensions in his convent, and attributes his expulsion and the indignation of the king, in part at least, to the insinuations of his enemies at Glastonbury. “*Quidam enim ex fratribus monasterii, qui virum contra omnes æmulos tueri, et ei usque ad mortem, more filiorum bonorum, obsequi deberent, propria nequitia magis quam ipsius doctrina imbuti, se medios ad provocandum regem contra illum clanculo injecere, et quod edictum de expulsionem ejus immobile fuerit, quantum poterant institere.*” There are hints of these dissensions and secret machinations in Bridferth, but the extent and importance to which they arrived are more fully detailed by Eadmer: Walsingham also laments “*in mediis fratribus seditionis fornacem eo periculosiorem quo a pesti familiari succensus;*” but he attributes this rebellion at Glastonbury to the arts of the woman. “*Extensus manum suam, ex magna parte conventum Glastoniæ in abbatem convertit, et a familiaribus causam suæ malitiæ prosequendæ excitavit, excitatamque fovit.*” The austerity of Dunstan and the strict discipline he maintained at Glastonbury had probably alienated from him a portion of his monks, whose discontent furnished a pretext and afforded a facility for his deprivation.

That his unpopularity was not confined to his convent, appears from a story told by Bridferth and repeated by his other biographers. As the officers were making an inventory of his effects, a shout of joy was heard in the church. It seemed to be the voice of a young woman; but Dunstan knew and his biographers believe, that it was the common

enemy of mankind, exulting over the fall and expulsion of the saint.

The names of the women who figure in the coronation scene are not given either by Osbern or by Eadmer, and of one of them no further mention is made; but the tragical fate of the other, which Bridferth has omitted, is related by both, though with some difference in the details. According to Osbern, the Mercian insurgents, when in pursuit of the king, caught the adultress, who had been living in his company and was flying with him, and put her to death; and Eadmer in his *Life of Dunstan*, manifestly copying from Osbern, gives the same account of her destruction. But in his *Life of Oda*, compiled apparently from a different source, he attributes to that prelate her separation from the king, the ignominious punishment she endured, her banishment to Ireland, and cruel death on her return from exile. It was Oda, in this version of the story, that "*pontificali auctoritate usus*," carried off by force from the king's court, where she resided, one of the foresaid women, "*qua nimium contumeliosis amplexibus rex frequentius abutebatur*." It was Oda who consigned her to perpetual banishment in Ireland, "*in facie deturpatam, ac candenti ferro denotatam*." It was the servants of "the men of God" who seized her at Gloucester, on her return from Ireland, after the recovery of her beauty, before she joined Eadwig; and it was by their hands that she was hamstrung, "*ne meretricio more ulterius vaga discurreret*;" and, after lingering in torment for several days, "*mala morte præsentis vitæ sublata*."

It is surprising that this barbarous execution, which Eadmer relates with manifest triumph and approbation, should have been omitted by Bridferth, whose detestation of the woman, as the enemy of Dunstan, ought naturally to have led to the history of her punishment. Nor is it easy to reconcile this edition of the story with the account of Osbern, unless on the supposition that the Mercian insurgents and the servants of the "men of God" are considered by these historians as one and the same persons. An expression of Osbern gives some countenance to this conjecture. Providence, he tells us, pitying the English people for the loss of Dunstan, roused against Eadwig the hearts of all living between the Humber and the Thames. It is, I believe, the established phraseology on such occasions, to ascribe to the Deity what is effected by the victorious arms of his servants.

To those who have witnessed the change and sudden vicissitudes of public opinion, it will not appear surprising, that, though the disgrace and expulsion of Dunstan are supposed to have roused the whole Mercian population against Eadwig, the innovations of that prelate and his associates were found on trial so little acceptable to the people, that, within a few years, the loss of Eadgar, the protector of the monks, was followed by a furious persecution of that order through all the provinces of Mercia. On the death of that prince, says the biographer of Oswald, "*timore concussi sunt monachi—clerici læti effecti—expelluntur abbates cum monachis suis, introducuntur clerici cum uxoribus suis. Princeps Merciorum gentis, no-*



“ mine Ælfhere dictus, sumens munera enormia,  
 “ quæ obcæcent mentes plurimorum, cum consilio  
 “ populi et vociferatione vulgi, ejecerunt non solum  
 “ oves sed etiam pastores. Qui prius solebant equis  
 “ insidere faleratis, et cum sociis concinere melli-  
 “ fluum carmen Davitici regis, tunc cernere possis  
 “ sarcinam pati, invectos ut priscus patriarcha  
 “ vehiculo in Egyptum, vel cum sociis aut cum  
 “ amicis ambulantes sine sacculo, sine calceamen-  
 “ tis.” In these times, he continues, if any one  
 was seen in our dress, he was pursued by the rab-  
 ble, as if he had been a wolf that had got into the  
 sheepfold. With apparent satisfaction, he adds,  
 that within a few years all the bitterest enemies of  
 the monks fell into misery; in consequence, no  
 doubt, of the Danish invasion, which became in  
 this way the instrument of Providence to chastise  
 the fickleness of the Mercians.

It would be useless to repeat from late writers  
 accounts manifestly copied from the historians  
 already cited. Matthew of Westminster, as Dr.  
 Lingard justly remarks, has taken his description  
 of the coronation scene from Bridferth, but to the  
 woman who makes so conspicuous a figure in the  
 story as the enemy of Dunstan, he gives the names  
 of Algiva and Ethelgiva. Dr. Lingard, indeed, in-  
 forms us, that Algiva and Ethelgiva are the same  
 name in Saxon; and it is true that the Saxon word  
 Æðelgifu might be contracted into Algiva by a  
 Norman scribe, though I have met with no instance  
 of it. The word Ælfgifu, on the contrary, the name  
 of Eadwig's wife, from whom he was separated by

Oda, is continually written Algiva or Elgiva by the later Normans.

The abbot of Jervaux, improving on the tale of his predecessors, makes the kinswoman of Eadwig to have been the wife “*cujusdam Magnatis*<sup>1</sup> ;” and such is the vulgar propensity to exaggeration, that Fabian, Stow, Speed and Baker have preferred this invention of the fourteenth century to the story of the older chroniclers, with the addition, that Eadwig “shortly after slew her husband, the “more freely to possesse his incestuous pleasure.”

There is still a third variation of the story, different from all the others.

A contemporary of Bridferth, who wrote a Life of St. Oswald, informs us, that when the woman with whom the king cohabited was carried off from his country seat by Oda, and sent into exile, Eadwig was married to another person: and the same historian hints, that he had possessed himself of his kinswoman by force—“*sub propria uxore alteram adamavit, quam et rapuit.*”

It is one of the many difficulties and apparent contradictions in the accounts left us of Eadwig, that this biographer of Oswald seems to have been unacquainted with his subsequent misfortunes and his wretched death. After relating the forcible abduction of his mistress, our author adds, that Oda waited on the king, “*et dulcibus ammonuit verbis pariterque factis, ut ab impiis artibus custodiret se, ne periret Dei ira justa.*” The advice so given, he tells us, was taken in good part, and from that

<sup>1</sup> Bromton, apud Twysden, p. 862 *seq.*

time forward "*rex omnisque sors et decus regni*  
"*ad eum (Odonem) humili vultu inclinavit.*" No mention is made of the return of the woman from exile, of the punishment she underwent at Gloucester, of the Mercian insurrection or other calamities that are supposed to have attended Eadwig towards the close of his reign.

With his usual haste and neglect of consistency, Eadmer adopts the story last related in his *Life of Oswald*. The woman carried off by Oda "*a regali curia in qua mansitabat,*" and then banished to Ireland, he describes as a person, "*cui rex, omissa conjugē sua, sæpius commiscebatur.*"

It is also to this story that Florence of Worcester alludes, when he says that Oda separated Eadwig and Ælfgifu, "*vel quia, ut fertur, propinqua illius extitit, vel quia illam sub propria uxore adā-mavit.*" He was unable to ascertain which was the true story, but he seems to have had no doubt that it was of one and the same person that these two different traditions were extant.

The words of Florence are repeated without addition or comment by Simeon of Durham, Hoveden and Matthew of Westminster.

According to Dr. Lingard's hypothesis, this woman, of whose person the king had obtained possession by force, and with whom he lived in public and notorious adultery, was the mother of his wife. Dr. Lingard has not, indeed, made this assertion in direct terms, but it is the necessary consequence of the system he has adopted. He has argued at length, that it was Ethelgiva (Æthelgifu) who cohabited with the king after his marriage, who was



carried off by force from his court or country seat by Oda, who was banished to Ireland and cruelly murdered on her return from exile ; and he has no doubt that Ethelgiva was the mother of Elfgiva (*Ælfifu*). But Elfgiva was the wife of Eadwig. That they were married, is evident from the Saxon Chronicle, which records their divorce. That *Ælfifu* was the wife of Eadwig, and *Æthelgifu* her mother, appears from their signature to the charter already cited. But is it conceivable, if Eadwig had maintained an incestuous connexion with his mother-in-law, that no notice would have been taken of it by his contemporaries, no allusion made to it by his numerous enemies and detractors ? When Eadbald of Kent had to wife the widow of his father, the unnatural connexion was recorded and reprobated by Beda. When *Æthelbald* of Wessex contracted a similar alliance, his infamy and repentance were commemorated by Asser. Had Eadwig cohabited at the same time with his wife and with her mother, among so many virulent enemies of his fame, would no one have dropped a hint of profligacy so scandalous and unprecedented ? Would a story injurious to his reputation have been related with the omission of the most aggravating and revolting circumstances ? Would the complete detection and exposure of his guilt have been left to the nineteenth century to elicit ?

But I am not convinced by Dr. Lingard that Ethelgiva is the person described by historians as the woman torn by Oda from the king. There is no mention in any ancient author of Oda having twice interfered with the domestic connexions of

his sovereign. Now, we know from the Saxon Chronicle, that it was Ælfgifu whom he separated from Eadwig; and though she is called Ælfgiva by Florence of Worcester, I know of no transmutation of names, by which Ælfgifu or Ælfgiva can be converted into Ethelgiva.

We are told, indeed, that the story we are inclined to prefer, is inconsistent with dates; that the woman banished by Oda was murdered at the time of the Mercian insurrection, and that Eadwig was not separated from Ælfgifu till two years afterwards. To this we reply, that the date for the separation of Eadwig and Ælfgifu is taken from the Saxon Chronicle, which makes no mention of the insurrection or of the murder; that the biographers, who relate the murder or describe the insurrection, give no date whatever; and that subsequent writers, who have combined in their narrative the inconsistent accounts of their predecessors, have, without warrant from ancient authority, assigned what dates they pleased to the stories they thought fit to adopt. How little weight is due to any argument from the chronology of this period appears from the discrepancies in the different manuscripts of the Saxon Chronicle. One manuscript makes Dunstan to have been banished in 955, another in 956. One manuscript places the death of Eadwig in 957, another in 958, and a third in 959. The same uncertainty as to dates attends the death of Oda. By Florence of Worcester, who is followed by the Bollandists and Wharton, he is said to have died in 958; Malmesbury makes him survive Ead-

wig; and the Saxon Chronicle postpones his death to 961.

On the whole I am disposed to conclude,—

1. That the story of Eadwig, as commonly told, is in many parts false, and in others problematical. That he compelled Dunstan to quit the kingdom, and that he was forced by Oda to repudiate Ælfgifu, may be credited on the evidence of the Saxon Chronicle. That he protected the secular clergy against the monks, is probable from the inveterate hatred of the monkish chroniclers to his memory; but that he expelled the monks from Abingdon and Glastonbury, and dissolved their monasteries, is untrue. The stories of his rapacity and lewdness, the fate of his queen or mistress, the insurrection of his subjects in consequence of the badness of his government, rest on the doubtful authority of his enemies, and cannot be reconciled with the most respectable and authentic monuments of the times.

2. That among his enemies two inconsistent stories are in circulation; one making him contract an illegal marriage with a near kinswoman, which was dissolved by the authority and violence of Oda; the other representing him as a dissolute prince, holding an indecent, if not a criminal intercourse with a mother and her daughter at the same time, and persisting in his connexion with one of them after his marriage to another woman.

Such being the case, it is humbly apprehended that a Protestant may take part with Eadwig and compassionate the fate of Ælfgifu, if he believes in the story of her misfortunes, without incurring the



charge of impiety ; and that a Catholic, if he choose, may paint Eadwig as a cruel and incestuous tyrant, abuse his wife or mistress as another Jezebel, and laud Dunstan and Oda as fearless champions of morals and decorum, with numberless authorities on his side, which, taken singly and uncontradicted by other evidence, would establish without a doubt all his conclusions.

But, if an unprejudiced inquirer were called upon to give his judgment between the two parties, he would be compelled, I fear, to answer, as in many other historical controversies, *mihi non liquere*.

#### NOTE.

John of Wallingford was abbot of St. Albans from 1195 to 1214, when he died. He wrote a chronicle of events from the arrival of the Saxons in England to the death of the Duke of Normandy at Nice in 1035. It is published by Gale, i. 525-550.

This author accuses Eadwig of aspiring to the throne in the life-time of his uncle Eadred.

“ Aspiravit interea Eadwinus (Eadwius), major natu filiorum Eadmundi, ad regnum, quod sibi de jure hæreditario deberi privata familiaritas suggesserat, quocirca omnes familiares avunculi sui Eadredi invido oculo respexit, et [licet] manu nil auderet dum rex viveret, tamen interiorem invidiæ flammam vultus et oculorum torvitate depromebat, unde et plures magnates, regis fortunæ amici, futurum regem metuentes, a curia recesserunt.”—541, 542.

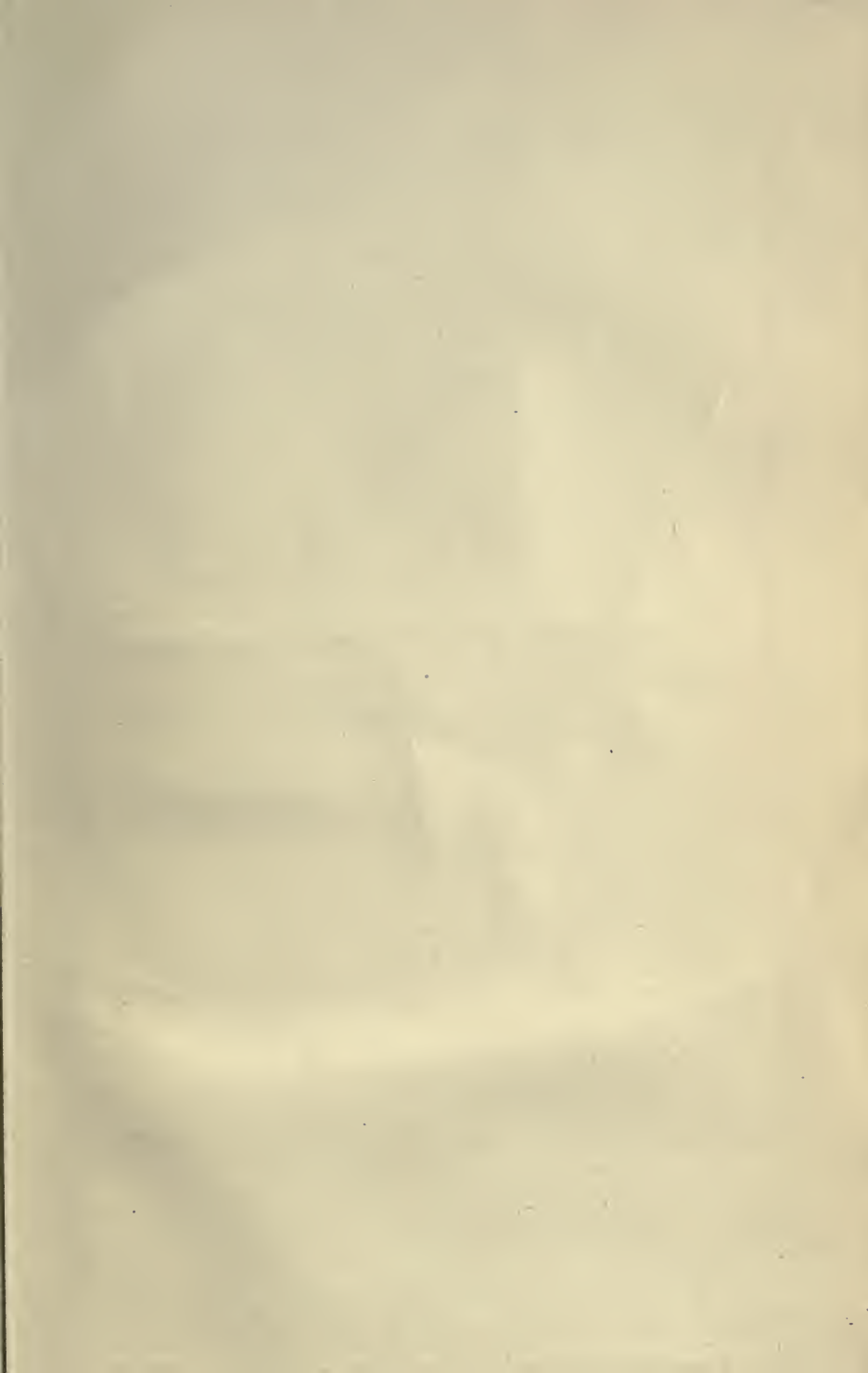
There is no hint of these ambitious views of Eadwig in any former historian, and little confidence is to be placed in the unsupported allegations of an author, who, like Wallingford, was so ignorant of the history of that time as to represent Eadred as a

person worn out by age and by the infirmities consequent on age, such as loss of teeth and consequent inability to masticate any solid food, by which his days were abridged: "*languor et familiaris senibus tussis frequens.*" Eadred could not have been more than thirty-two at his death, yet Lingard adopts from Walingford the charge against Eadwig. See Turner, ii. 376.

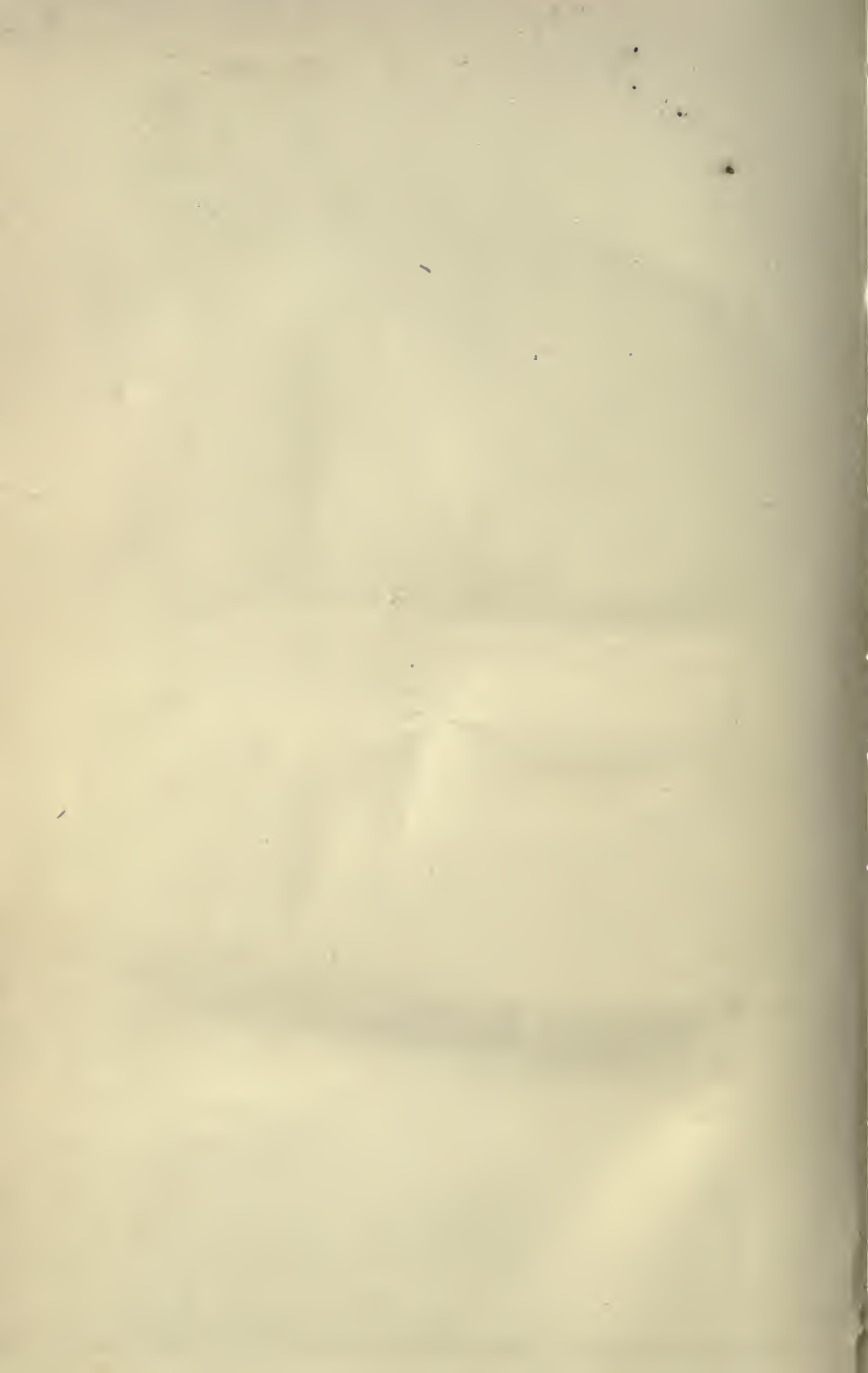
THE END.



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